

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 240

THE MERCHANTS NATIONAL BANK OF RICHMOND,
VIRGINIA, PLAINTIFF IN ERROR,

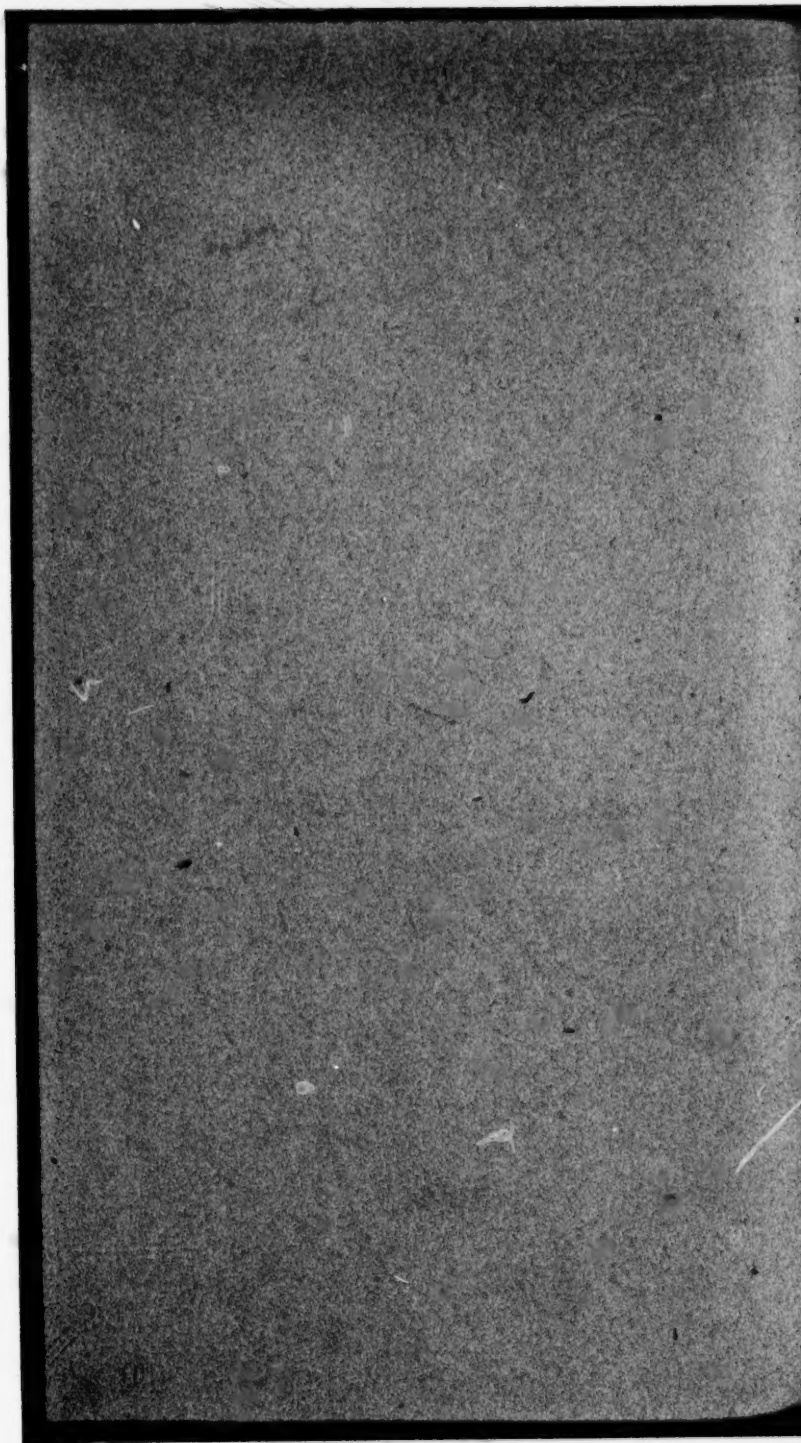
vs.

THE CITY OF RICHMOND.

ON WRIT OF HABEAS CORPUS TO REMOVE TO SUPREME COURT OF APPEALS OF DISTRICT OF COLUMBIA
OF VIRGINIA.

FILED FOR RECORD & INDEX

(27,000)



(27,465)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 710.

THE MERCHANTS' NATIONAL BANK OF RICHMOND,
VIRGINIA, PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF VIRGINIA.

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In the Supreme Court of Appeals of Virginia, at Staunton.

MERCHANTS NATIONAL BANK, Plaintiff in Error.

v.

CITY OF RICHMOND, Defendant in Error.

Petition for Writ of Error.

to the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the Merchants' National Bank of Richmond, Virginia, a National Banking Corporation, duly organized under the laws of the United States of America, and having its banking house in the City of Richmond, Virginia, respectfully represents unto your honors, that it is aggrieved by an order or judgment entered by the Hustings Court of the City of Richmond, on to wit: on the 19th., day of April 1919, by which order the application of the petitioner for the correction of an erroneous and improper assessment of taxes assessed against it by the City of Richmond, upon its capital, surplus and undivided profits for the year 1915, was denied, and its petition dismissed.

Statement in the Case.

A transcript of the record, which is presented herewith, shows that on February 5, 1917, the petitioner filed in the Hustings Court of the City of Richmond an application for relief from a tax amounting to \$18,489.20, assessed against it by the City of Richmond. The said petitioner alleged that the said tax was illegal, improper and erroneous because:

1. The said tax was assessed against the petitioner directly upon its capital, surplus and undivided profits in solido contrary to Section 18 of the Tax laws of the State of Virginia, and contrary to the provisions of Section 5219 of the Revised Statutes of the United States.

2. The said tax was levied at the rate of \$1.40 on each one hundred dollars of the assessed value of the capital, surplus and undivided profits, while the City of Richmond for 1915 levied a tax upon moneyed capital in the hands of individuals other than the capital of banks, trust and security companies at the rate of thirty (30¢) cents on the one hundred dollars of the assessed value thereof. The petitioner alleges that this discrimination against the capital, surplus, and undivided profits of banks, trust and security companies and in favor of moneyed capital in the hands of individuals in the said City of Richmond was repugnant to:

A. Section 1040 A. of the Code of Virginia.

B. Section 168 of the Constitution of the State of Virginia.

C. Section 5219 of the Revised Statutes of the United States.

Upon the rehearing of the case the application of the petitioner, the motion to dismiss and the answer of the City of Richmond, and upon the evidence introduced the Hustings Court of the City of Richmond on August 3rd., 1917, granted the relief prayed for, holding that the tax at the rate of \$1.40 imposed upon the capital, surplus and undivided profits of the petitioner was illegal and void but that under the ordinance of the City of Richmond a tax at the rate of thirty (30¢) cents upon each one hundred dollars was imposed and should have been assessed against the individual shareholders of the peti-

4 tioner upon the value of their shares of stock therein, whereupon the Court directed that the petitioner be relieved of the tax complained of, and that the shareholders of the petitioner be assessed upon their shares of stock at the rate of thirty (30¢) cents on each one hundred dollars assessed thereof.

Upon appeal, this Honorable Court on March 13th, 1919, reversed the said order of the Hustings Court without passing on the question as to whether or not the tax complained of was assessed directly against the petitioner upon its capital, surplus and undivided profits, and without construing the ordinance under the pretended authority of which the tax complained of was assessed. The case was then remanded to the Hustings Court of the City of Richmond for further proceedings to be had in conformity with the opinion of this Court.

On April 19th, 1919, the final order was entered by the Hustings Court of this City dismissing and refusing a relief to the petitioner of this order, the petitioner now seeks a writ of error:

The Law.

In the brief filed at the former hearing before this court and in the oral argument, the repugnancy between the tax com-
5 plained of, and section 5219 of the Revised Statutes of the United States was insisted upon and argued at length. It is not the purpose of the petitioner to repeat here this argument, however, the attention of the court is respectfully directed to the definition of moneyed capital, within the meaning of Section 5219 of the revised Statutes as defined by the Supreme Court of the United States in *Mercantile National Bank v. New York* 121 U. S., 138, 30 L. Ed. 895; In which the Court said:

"The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individ-

uals is distinguished from what is generally known as personal property. Accordingly, it was said in *Evansville Bank v. Britton*, 105 U. S. 322: 'The Act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest interest mentioned in the Indiana Statute from which *dona fide* debts may be deducted, all mean moneyed capital invested in this way.' This definition of moneyed capital in the hands of the individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

This definition, holding that moneyed capital includes not only shares of stock in moneyed corporations doing a banking business, but also money in the hands of individuals invested in securities similar to the securities in which the assets of the National Banks are invested has been subsequently adhered to by the Court. *National Bank etc. v. Boston*, (1888) 125 U. S. 60, 31 L. Ed. 689; *Palmer v. McMahon* (1890), 133 U. S. 660, 33 L. Ed. 772; *Talbott v. Board of Commissioners, etc.* (1891), 139 U. S. 438, 35 L. Ed. 210;

First Nat. Bank v. County of Chehals, (1897), 166 U. S. 440; *New York, ex. rel. Amoskeag Sav. Bank v. Purdy*, (1913), 231 U. S. 373, 58 L. Ed. 373.

Thus the Supreme Court of the United States has always held the State taxation of shares of stock of a National Bank was illegal where it appeared that the State imposed upon such shares a tax at a higher rate than it imposed upon capital in the hands of individuals citizens invested in securities similar to those in which the assets of the National Bank was invested. It is held that securities payable upon demand, money loaned at interest, credits, and claims against persons and corporations are the kind of moneyed capital in the hands of individuals within the contemplation of Section 5219 of the Revised Statutes of the United States.

However, the State of Virginia in 1915 limited each City, County and Town to the imposition of a tax at a rate of not exceeding thirty (30¢) cents on each one hundred dollars on all capital, and all intangible personal property with the exception of the capital employed in the Mercantile business and the shares of stock of Banks, trust and Security Companies. The law imposing the said State tax upon such capital, and other intangible personal property, and authorizing Cities, Counties and Towns to impose taxes thereon, being as follows:

Personal Property in Choses in Action, et Cetera. (Intangible Personal Property.)

8. (As amended by act approved March 17, 1915.)

8 The classification under schedule C shall be as follows:

First. Bonds, notes and other evidences of debt, including bonds of other States than Virginia, bonds of counties, cities and towns, located outside of the State of Virginia, bonds of railroad and canal companies and other corporations, bonds of individuals and all demands and claims however evidenced, whether secured by deed of trust, judgment or otherwise, or not secured.

The commission shall require each person, natural or artificial, residing in his district, city or town, to make out and deliver to said commissioner a list in detail of the date, amount for which originally given, but not the name of the debtor, the dates and amounts of the credits thereon, the balance due, and the time of pay- of all bonds, notes and other evidences of debt owing to such person in excess of one hundred dollars, and a statement of the aggregate amount of all bonds, notes and other evidences of debt under one hundred dollars each. The auditor of public accounts shall furnish the necessary blanks for such lists and statements to the commissioner of the revenue.

The list and statement shall be signed and sworn to by the taxpayer before the commissioner of the revenue or some notary public, or some person authorized to administer oaths, who shall certify that said list was signed and sworn to before him. The commissioner shall sign the list and determine the value of the bonds, notes and other evidences of debt therein enumerated, subject to an appeal from his valuation to the circuit, hustings or corporation court. The said list and statement shall include bonds of railroad and canal companies, bonds of counties, cities, towns, located outside of the State of Virginia, and bonds of other States and corporations, bonds of individuals, and all demands and claims, however evidenced, whether due or not, from debtors residing out of or within the State, city or county, whether secured by deed of trust or by judgments or not, deducting from the aggregate amount thereof all such bonds, demands or claims not otherwise deducted owing to others as such principal debtor, and not as guarantor, endorser or surety; but not deducting any money that may be due to others on account of the purchase of securities which are non-taxable; but no bond, demand or claim constituting a part of the capital as defined in this act of the business done out of this State, or any capital used by any merchant or manufacturer, and taxed upon this act shall be included in this section. No credit shall be given for debts due nor deductions made unless such taxpayer shall append to said list an inventory showing the persons and address to whom said demands or debts are owing and the amount of each.

The list and statement herein provided for shall be delivered by

said commissioner to the clerk of the circuit, hustings or corporation court of his county or city, who shall file the same in his office, properly lab-¹⁰leled, keeping the list for each year separate. If any person, firm or corporation shall, with a view to evade the payment of taxes, fail or refuse to make out and deliver under oath such list and statement as herein provided for of any such bonds, notes or other evidences of debt then the omitted evidences of debt shall not be recoverable by action at law or suit in equity in any of the courts of this Commonwealth or by any legal process, or by sale under deed or trust, or otherwise, until they shall have been reported for assessment, and the taxes paid thereon for the year that they should have been paid, with and addition of fifty per centum of the amount of said unpaid taxes; and the failure to make out such list and statement to the said commissioner shall be taken as prima facie evidence of the intention to so evade payment of taxes.

But where in any action at law or suit in equity it is ascertained that there are unpaid taxes and penalties on the evidence of debt sought to be enforced, and the suitor makes affidavit that he is unable to pay these taxes and penalty, but is willing for the same to be paid out of the first recovery on the evidence of debt, the court shall have authority to enter as a part of the judgment or decretal order in said proceeding that the amount of taxes and penalties due and owing shall be paid to the proper officer out of the first collection of said judgment or decree.

Second. All capital of individuals, including moneys, credits, or other things loaned, used or employed in business out of this State.

Third. All capital of corporations, or incorporated joint stock companies otherwise taxed; and when all of such capital is taxed by this State, the shares of such stock in the hands of individual shareholders shall not be further taxed for State purposes; but real estate belonging to such corporations and companies shall not be held to be capital but shall be listed and taxed as real estate.

Fourth. All capital of individuals invested, used or employed in any trade or business not otherwise taxed. Money and credits actively used and employed in carrying on the trade of business, materials, goods, wares, and merchandise on hand and all solvent bonds, notes, demands or claims made or contracted in the course of business during the proceeding year (but not including any moneys on hand received from loans made for a period of not more than four months, which shall be owing and shall have been actually contracted for the necessary conduct of such business) shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital, but real estate shall not be listed as such capital but shall be listed and taxed as real estate; provided, however, that nothing herein shall prevent cities and towns of this Commonwealth from imposing a license tax on merchants, mercantile firms or corporations, based on their purchases or other-

wise, in pursuance of their respective charter or general laws of the State for the government of cities and towns.

Fifth. The value of the principal or personal estate and credit other than money under the control of a court receiver or commissioner, in pursuance of an order, judgment or decree of any court, or in the hands or under the control of an executor, administrator, guardian, trustee, agent, or other fiduciary; and the principal of personal estate and credits other than money deposited to the credit of any suit and not in the hands of a receiver or other fiduciary.

Sixth. All money other than money used or employed in any trade or business not otherwise taxed on deposit with any bank or other corporation or firm or persons, or in the possession or under the control of the owner, whether such money be actually in or out of this State and belonging to a citizen of this State, which shall include certificates of deposit of any bank, banking association, trust

12 or security company; provided, that money herein defined shall not be liable to taxation by any of the counties, cities, towns, school districts or other local subdivisions of this State.

All money under the control of a court receiver or commissioner in pursuance of an order, judgment or decree of any court or in the hands or under the control of an executor, administrator, guardian, trustee, agent, or other fiduciary; and all money deposited to the credit of any suit, and not in the hands of the receiver or other fiduciary.

Seventh. All shares of stock of corporations or joint stock companies, except such corporations and joint stock companies all of whose capital is taxed by this State, or which pay a franchise tax in this State, and banks, banking associations, trust and security companies, and insurance companies, which are otherwise taxed in this State.

Eight. All bonds of counties, cities and towns, or other political subdivisions of this State.

Taxes On Personal Property In Choses In Action, etc. (Intangible Personal Property.)

Section 9. (As amended by act approved March 17, 1915.) The taxes on intangible personal property shall be as follows:

On all property embraced in classes one, two, three, four, five and seven in this schedule there shall be a tax of sixty five cents on every hundred dollars of the assessed value thereof, which shall be paid into the State treasury and applied to the payment of the expenses of the government. And any City in this State may levy a tax on such property assessed to residents therein at a rate not to exceed

13 thirty cents on the one hundred dollars of assessed valuation thereof; and the board of supervisors of any county may levy a district road tax on such property assessed to residents in any magisterial district proposed to be taxed for district purposes

to be used exclusively for the construction and repair of public roads and bridges located within the magisterial district in which said levy is laid at a rate not to exceed thirty cents on the one hundred dollars of assessed valuation thereof, but this clause shall not be considered to authorize the board of supervisors of any county to levy such tax against the residents of any incorporated town within such magisterial district which maintains its own roads; and any incorporated town in this State which is exempt by Statute or by the express provisions of its charter from the payment of district road tax, or which maintains its own roads free of expense to the magisterial district may levy a tax on such property assessed to residents therein at a rate not to exceed thirty cents on the one hundred dollars of assessed valuation thereof.

On all property embraced in class six in this schedule the tax shall be as provided by law. On all property embraced in class eight in this schedule there shall be a tax of thirty five cents on every one hundred dollars of the assessed value thereof, which shall be paid into the treasury of the State. Provided, however, that from and out of the tax on all such property paid to and retained by the State for the expenses of the State government there shall be set aside ten cents on every hundred dollars of the assessed value thereof, which shall be applied to the support of the public free schools of this State. Provided, further, however, that in the

event any taxpayer shall fail, without just cause shown, to return for taxation any intangible personal property under the provisions of this schedule within the time prescribed by law, and it is ascertained thereafter that any such property has not been returned for taxation, it shall be assessed when discovered, and taxed at the full rate of taxation provided for real estate in this State, which shall include the State rate and local rates and levies of the county, district, town or city wherein the owner or taxpayer has his legal residence. The provisions of this section of this schedule shall apply with equal force of any person or corporation representing in this State business interest that may claim a domicile elsewhere, the intent and purpose being that no non-resident person or corporation either personally or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens, and all bills receivable, obligations or credits and other intangible assets arising from the business done in this State are hereby declared assessable within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative.

The provisions of this act shall apply to the assessment and collection of State taxes and local levies for the year nineteen hundred and fifteen and thereafter until otherwise provided by law.

The collection of the public revenue for the year being affected, an emergency is hereby declared to exist, and this act shall be in force from its passage.

From the foregoing law it is clear that the Commonwealth of Virginia taxed bonds, notes and other evidences of debt, demands

and claims, classified in class one supra, and capital of individuals, including money credits and other things loaned, used or employed in business out of this State classified in class two supra, and all capital of individuals invested, used or employed in any trade or business not otherwise taxed, including money and credits actually used or employed in carrying on the trade of business and all solvent bonds, notes, demands and claims made or contracted in the course of business, classified in class four supra, in exactly the same way.

The property in all these three classes which include all moneyed capital in the hands of individuals with the sole exception of stock in Banks, Trust and Security Companies was for the year 1915 taxed by the State at the rate of sixty-five (65¢) cents on each one hundred dollars assessed value and by the law each City, County and Town was limited to the rate not exceeding thirty (30¢) cents on each one hundred dollars assessed valuation of this class of property.

It appears from the record, page 50, that the amount of moneyed capital in the hands of individuals listed for taxation in the City of Richmond for the year 1915 was \$6,250,252.00 all of this property was taxed by the City at the rate of Thirty (30¢) cents on the one hundred dollars, and by the State at sixty-five (65¢) cents on the one hundred dollars. It also appears from the record, page 32,

that there was in 1915, capital of the National Bank in the City of Richmond the aggregate assessed value of which was \$8,320,521.00 and banks other than National Banks having an aggregate capital the aggregate assessed value of which was \$6,030,294.00. Upon all this capital there was imposed a City tax of \$1.40 on the one hundred dollars and a State tax of thirty-five (35¢) cents on the one hundred dollars.

It thus appears from the record that during the year 1915 the tax imposed upon the capital, surplus and undivided profits of the petitioner was at a higher rate than on that imposed upon other moneyed capital, in the hands of individual citizens and that therefor the said tax was repugnant to Section 5219 of the Revised Statutes of the United States.

Wherefore, the petitioner prays that it may be allowed a writ of error and supersedeas to the aforesaid order of the Hustings Court of the City of Richmond, entered on the 19th of April and that the same may be reviewed and reversed by the Honorable Court.

Respectfully submitted,

MERCHANTS NATIONAL BANK.

Richmond, Virginia.

BY COUNSEL.

JOHN PICKRELL,
LEGH R. PAGE,
E. WARREN WALL,
Counsel.

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We the undersigned attorneys practicing in the Supreme Court of Appeals of Virginia do certify that in our opinion

the order of the Hustings Court of the City of Richmond, complained of in the foregoing petition is erroneous and that the same should be reviewed by the Supreme Court of Appeals of Virginia.

LEGH R. PAGE.

E. WARREN WALL.

18 STATE OF VIRGINIA,
City of Richmond, To-wit:

Pleas at the Courthouse of the City of Richmond, before the Hustings Court of the said City on the 19 day of April, 1919.

Be it remembered that heretofore, to-wit, on the 5th day of February, 1917, the Merchants National Bank of Richmond filed in said Court its petition for the correction of an alleged erroneous assessment of taxes, which petition is in the words and figures following, to-wit:

COMMONWEALTH OF VIRGINIA:

In the Hustings Court of the City of Richmond.

MERCHANTS NATIONAL BANK OF RICHMOND

VS.

CITY OF RICHMOND.

The Petition of the Merchants National Bank of Richmond for the Correction of an Illegal Tax Assessment Made Against it by Said City of Richmond and for Refunding so Much of Said Tax as Has Been so Illegally Assessed and Collected.

19 To the Honorable D. C. Richardson, Judge of the Hustings Court of the City of Richmond:

The humble petition of the Merchants National Bank of Richmond would respectfully show unto Your Honor that during all the times hereinafter mentioned petitioner was and is now a National Banking Association incorporated and organized under the National Banking Act of the United States of America with its principal office or banking-house in the City of Richmond, Virginia, and that it is aggrieved by the erroneous and illegal assessment and collection of a tax of the said City of Richmond, amounting to \$18,489.20, the same having been assessed as of the first day of February, 1915, against petitioner as hereinafter more particularly stated.

And thereupon petitioner says that the said City of Richmond proceeded to levy its taxes for the year 1915 upon all the different classes of property, subject to taxation by it, by an ordinance approved April 9, 1915, the third paragraph whereof, so far as material, is in words and figures following, to-wit:

"On all intangible personal property, including bonds and stocks, three-tenths per centum of value; on bank capital surplus and undivided profits, less assessed value of real estate included in said capital and surplus and undivided profits, one and fifteen-hundredths per centum of value, provided that for the year 1915 the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value."

And petitioner further says that, acting under the pretended authority of said ordinance, the Commissioner of the Revenue of said City of Richmond, with whom petitioner had filed the report required by section 17 of the Revenue Bill of the State of Virginia as then amended and in force, erroneously and illegally assessed against petitioner for and in behalf of said City of Richmond, as of the first day of February of the year 1915, the tax hereinbefore complained of, to-wit, \$18,489.20; that said tax was assessed directly against petitioner at the rate named in said ordinance, to-wit, \$1.40 on the \$100, upon the sum of \$1,320,662.11; that the amount last named was arrived at by said Commissioner of the Revenue 20 by deducting from the aggregate of petitioner's capital surplus and undivided profits, amounting to \$1,441,293.97, the assessed value of its real estate, amounting to \$111,050.00, and the indebtedness owed by certain of its stockholders as principal debtor, aggregating \$11,321.86.

And petitioner further alleges that afterwards, to-wit, in June, 1915, said Commissioner of the Revenue, as required by section 18 of said Revenue Bill as then amended and in force, delivered to petitioner a copy of said assessment list and said City of Richmond demanded of petitioner the payment of said erroneous and illegal tax so assessed against it and that thereupon petitioner, to escape the penalties that it would have incurred by its failure or refusal so to do, was compelled to pay and did in fact pay said tax to said City of Richmond, one moiety thereof, amounting to \$9,244.66, on the 17th day of June, 1915, and the other moiety thereof, amounting to \$9,244.66, on the 22nd day of December, 1915.

And petitioner avers that the levy and assessment of the tax of the said City of Richmond hereinbefore mentioned and complained of was illegal and erroneous in this that said tax, instead of being levied and assessed by said City of Richmond against the shareholders of petitioner upon the value of the shares of stock held by them respectively, was levied and assessed by it in solido against petitioner itself upon the aggregate of its capital, surplus and undivided profits less the deductions therefrom hereinbefore mentioned and as so levied and assessed, was a tax upon the capital of petitioner contrary to section 5219 of the Revised Statutes of the United States and likewise contrary to the following statutes of Virginia then in force, to-wit: section 1040-a of the Code of Virginia Pollard's Edition 1904; section 17 of the Revenue Bill of April 16, 1903, as said section was amended and re-enacted by an act approved March 12, 1908, and as further amended and re-enacted by an act approved January 30, 1912 (Chapter 15 of the Acts of the General Assembly

of Virginia for the year 1912 at page 18) ; section 18 of said Revenue Bill as said section was amended and re-enacted by said act approved March 12, 1908 (Chapter 213 of the Acts of the General Assembly of Virginia for the year 1908, pages 325-326) ; and section 19 of said Revenue Bill (Chapter 148 of the Acts of the General Assembly of Virginia for the session of 1902-1903-1904, page 164).

And petitioner, while insisting that said tax was levied and assessed by said City of Richmond directly against petitioner upon its capital as hereinbefore alleged, nevertheless avers that, even
21 if said tax should be held to have been in effect levied and assessed against the shareholders of petitioner on the value of their shares in the manner prescribed in sections 17 and 18 of the Revenue Bill as then amended and in force, such levy and assessment of said tax was illegal and erroneous in this that it violated section 1040-a of the Code of Virginia above mentioned and particularly that part of section 1040-a which, in permitting the said City of Richmond, in common with other cities and counties of the State, to tax the shares of the capital stock of such banks, national and state, as were located within its corporate limits, expressly restricted said City to the same rate of taxation upon such shares as should be assessed by it upon other moneyed capital in the hands of individuals residing in said City. And thereupon petitioner says that while said City of Richmond, in and for the year 1915, levied and assessed upon the capital of petitioner or upon the value of its shares representing same the tax above mentioned, at the rate of \$1.40 on the \$100, and collected the amount thereof, to-wit, \$18,489.20, from petitioner as aforesaid, it levied by its ordinance above mentioned and caused to be assessed and collected, in and for the same year 1915, the comparatively insignificant tax of only 30 cents on the \$100 upon the value of all intangible personal property within its jurisdiction less the indebtedness of the owners thereof; although said intangible personal property consisted, inter alia, of bonds, notes, evidences of debt and other choses in action of the value of many millions of dollars and represented "other moneyed capital in the hands of individuals" residing in said City of Richmond, within the sense and meaning of said section 1040-a; thus grossly discriminating against the capital of petitioner and its shares of stock representing same in favor of other moneyed capital in the hands of individuals residing in said City of Richmond, in flagrant disregard of the express prohibition contained in said section 1040-a.

Petitioner further avers that the levy and assessment by said City of Richmond of the tax hereinbefore complained of was also erroneous and illegal in this that it violated that part of section 168 of the constitution of Virginia which requires that "all taxes whether state, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." And in support of this allegation petitioner says that its capital and its shares of its stock representing the same are intangible personal property and were of the same character and class
22 as the intangible personal property upon which the said City of Richmond, in and for the said year 1915, levied, assessed

and collected, as hereinbefore stated a tax of only 30 cents upon each \$100 of the value thereof and that the attempt of said City to separate the capital of shares of petitioner from such intangible personal property and to erect them into a class by themselves for the purpose of taxing them at the much greater rate of \$1.40 on every \$100 of the value thereof was without reasonable grounds or any ground whatever to support such classification, which was wholly arbitrary and capricious and therefore null and void.

And petitioner also avers that, being a National Banking Association, it was an agency of the Federal Government and as such could not itself nor could its shares in the hands of its shareholders be legally taxed directly or indirectly by the State of Virginia or any subdivision thereof except in the manner and to the extent authorized by section 5219 of the Revised Statutes of the United States, which, withholding altogether permission to tax such National Banking Associations on their capital or otherwise, authorized and empowered the states and the subdivisions thereof to levy and assess taxes only against the shareholders thereof upon the value of their shares in such institutions, subject however to the express condition that such taxes should not be at a greater rate than were assessed upon other moneyed capital in the hands of individual citizens of said states respectively.

And petitioner says that in addition to said tax levied and assessed against and collected from petitioner by said City of Richmond in and for the year 1915 at the rate of \$1.40 on the \$100 the State of Virginia, in and for the same year, also levied and assessed under section- 17, 18 and 19 of its said Revenue Bill as then amended and in force, and collected from petitioner a state tax, at the rate of 35 cents on the \$100, upon the aggregate amount of the capital, surplus and undivided profits of petitioner less the same deductions therefrom that were made as hereinbefore mentioned in arriving at a basis for the calculation of said City tax; and that in addition to said tax levied, assessed and collected by said City of Richmond in and for said year 1915, at the rate of 30 cents on the \$100, upon the value of all other intangible personal property within its jurisdiction less the indebtedness of the owners thereof, the state of Virginia in and for the same year, levied, assessed and collected under sections 23 8 and 9 of its said Revenue Bill as amended by an Act approved March 17, 1915 (Acts, Extra session 1915, page 160), a state tax, at the rate of 65 cents on each \$100 of assessed value, upon said intangible personal property subject to the same deduction, except (1) Upon money on deposit or in possession of the owner which was subject to taxation by the state alone and was taxed by it only at the greatly reduced rate of 30 cents on the \$100 and except (2) upon City, town and county bonds which are taxed by the State at the rate of only 35 cents on the \$100 of value; so that, without taking into account the two exceptions last mentioned, there was for said year 1915 a total tax, city and state, levied, assessed and collected upon the aggregate amount of the capital, surplus and undivided profits of petitioner less the deductions therefrom hereinbefore mentioned, of \$1.75 upon each \$100 value thereof as against a

total tax, City and state, upon all other intangible personal property subject to the jurisdiction of said city less the deduction aforesaid, of only 95 cents on each \$100 value thereof.

And petitioner says that in said year 1915 there were in said City of Richmond national banking associations, including petitioner, having capital, surplus and undivided profits to the aggregate amount of \$10,706,532.72 from which there were deducted by the Commissioner of the Revenue for said City the assessed value of the real estate owned by them respectively aggregating \$1,234,961, the value of the shares in such associations owned by residents of Virginia outside of said City of Richmond and given in by them for taxation at their several places of residence aggregating \$589,388.50 and the indebtedness as principal debtor of individual shareholders, deductible from the value of their shares, aggregating \$561,662.11, leaving a balance of \$8,326,521.11; that upon said balance the said City of Richmond assessed against and collected of said national banking associations, including petitioner, its said tax of \$1.40 on the \$100, to-wit, \$116,487.29, as a tax on the capital, surplus and undivided profits of said national banking associations; which tax was in addition to said state tax thereon of 35 cents on the \$100, to-wit, \$29,121.82.

That in said year 1915 there were also in said City of Richmond state banks and trust companies having, after deductions similar to those made in the case of national banking associations, an aggregate balance of capital, surplus and undivided profits of \$5,094,385.19 upon which the said City of Richmond assessed and collected its said tax of \$1.40 on the \$100, to-wit, \$71,321.39, and the State of Virginia assessed and collected its said state tax of 35 cents on the \$100, to-wit, \$17,830.35.

That there was also in said year 1915 in said City of Richmond subject to taxation by said city and state, intangible personal property consisting of bonds, notes and other evidences of debt to the value of many millions of dollars, that while much of such intangible personal property escaped taxation altogether, owing to the failure of said city and state to compel its disclosure, there was actually reported in that year for taxation intangible personal property consisting of bonds, notes and other evidences of debt to the amount of \$8,311,702 against which the owners thereof claimed and were allowed the right to deduct the amount of their indebtedness, to-wit, \$4,521,983, leaving a net balance subject to taxation of \$3,789,719; that upon this balance the said City of Richmond assessed and collected for the same year its tax above mentioned of only 30 cents upon the \$100, to-wit, \$11,369.15, and the State of Virginia assessed and collected its tax above mentioned at the rate of only 65 cents on the \$100, to-wit, \$24,633.17.

And petitioner avers that the intangible personal property aforesaid consisted of bonds, stocks and evidences of debt and represented other moneyed capital in the hands of individuals residing in said City and State within the sense and meaning of said section 5219 of the Revised Statutes of the United States and competed directly with the capital of petitioner and of the other national banking associations aforesaid and that said tax of \$1.40 on the \$100, amounting to

\$19,489.20, assessed against and collected of petitioner by said City of Richmond as aforesaid, was a gross intentional and wilful discrimination on the part of said City against petitioner and against its capital and the shares of stock representing the same on the one hand in favor of the other competing moneyed capital aforesaid and the owners thereof on the other hand in plain and obvious violation of said section 5219 of the United States Revised Statutes.

Wherefore petitioner says that it is aggrieved by said illegal and erroneous assessment by said City of Richmond of its said tax of \$1.40 on the \$100 and of the collection of the same from petitioner, amounting to \$18,489.20, and, applying for relief under section 571 of the Code of Virginia as at present amended, prays that said City of Richmond be made a party defendant to this petition and that a copy thereof be served upon it; that said illegal and erroneous assessment be corrected so as to conform to the law and that
25 so much of said tax as was improperly assessed and collected, to-wit, \$14,527.28, be ordered to be refunded to petitioner by said City of Richmond or its Treasurer; and for general relief.

And if it shall be held that the assessment by the City of Richmond of its said tax for the year 1915, instead of being against petitioner upon its capital, surplus and undivided profits, was in fact against its shareholders upon the value of their shares, then in that event petitioner prays that its petition be treated as an application made by it in behalf of its shareholders for relief against said erroneous and illegal assessment.

And petitioner will ever pray, etc.

MERCHANTS NATIONAL BANK
OF RICHMOND.

By R. H. BROADBUSH,

Cashier.

Its Counsel.

E. WARREN WALL &
PAGE & LEARY,
Counsel.

And on the same day, to-wit: At the same Hustings Court, held for the City of Richmond at the Courthouse on the 5th day of February, 1917, came the Petitioner by its Attorneys, pursuant to written notice addressed to and duly served upon Henry R. Pollard, Attorney for the City of Richmond, and Henry E. Tresnon, Commissioner of the Revenue for said City, and by leave of Court filed its Petition praying that the alleged illegal and erroneous assessment of the taxes of the said City of Richmond for the year 1915 in said Petition mentioned, be corrected, and that so much thereof as should prove to be illegally and erroneously assessed be refunded to Petitioner by said City of Richmond or its Treasurer; and thereupon said Petition is docketed and continued for hearing.

The following is a copy of the Motion of the City of Richmond to dismiss these proceedings, and the Answer of the City of Richmond to the foregoing Petition:

VIRGINIA:

In the Hustings Court of the City of Richmond.

MERCHANTS NATIONAL BANK OF RICHMOND

VS.

CITY OF RICHMOND.

6 *The Motion of the City of Richmond to Dismiss these Proceedings and the Answer of the City of Richmond to the Petition of the Merchants National Bank of Richmond for the Correction of an Alleged Illegal Assessment of Texas, etc.*

Comes the City of Richmond, by counsel, and moves the court to dismiss these proceedings on the ground that that the petitioner has no standing in this court under the statutes in such cases made and provided to make the motion to correct the assessments in the said petition mentioned, said assessment being against each individual stockholder holding or owning stock in the said Bank, therefore the said petitioner has no pecuniary interest whatsoever in the case, whether the tax is correct or incorrect, as in no manner can it be aggrieved by reason of the said assessment.

This Respondent, without waiving the foregoing motion, for answer to the said petition or to so much thereof as it is advised it is material for it to answer, answering says:

1. It is true that the petitioner was and is now a National Banking Association, incorporated and associated under the National Banking Act of the United States of America, with its principal office or banking house in the City of Richmond, Virginia, but Respondent denies that the said petitioner is aggrieved by the erroneous and illegal assessment and collection of a tax assessed by the City of Richmond, amounting to \$18,489.20, the same having been assessed as of the first day of February, 1915, for the said tax was not in fact assessed against the said Merchants National Bank of Richmond, but was assessed, in the mode prescribed by law, against the several stockholders owning stock in said bank, as will appear by reference to the statement furnished the Commissioner of the Revenue of the said bank, a copy of which is herewith filed to be read as a part of this answer.

2. Respondent denies that it levied taxes for the year 1915 against the stockholders of banks and banking associations under and by virtue of the ordinance approved April 9, 1915, and particularly under the third paragraph of said ordinance, quoted in said petition, but, on the contrary, says that said assessment and levy was made as of February 1, 1915, in pursuance of an Act of the General Assembly of Virginia then in force concerning the taxation of shares of bank stock owned by stockholders of banks and banking associations, trust

or security companies located in the State of Virginia, and in
 27 pursuance of sections 1 and 3 of an ordinance which became
 law February 13, 1906, embodied in Richmond City Code
 1910 as sections 1 and 3 of Chapter 15, Concerning the Levying of
 Taxes, which sections are in the words and figures following:

"1. There shall be levied and collected for each fiscal year the taxes
 following, to-wit:

* * * * *

"3. On all personal property, except such as is exempt from taxa-
 tion, one and four-tenths per centum of the value, and herein shall
 be included money and credits, stock and capital employed, all shares
 of stock in any bank, and all shares of stock in any corporation doing
 business in the city upon the capital stock of which no tax is im-
 posed. The taxes upon such shares of stock in any bank, located and
 doing business in the city, are to be paid by the cashier or principal
 officer of the company. The taxes upon all shares of stock shall be
 upon the market value of the same, and shall be assessed as taxes are
 assessed upon other moneyed capital. The provisions of this ordi-
 nance shall apply to the taxes for the year 1906 and every year there-
 after."

And also in conformity with the provisions of sections 17 and 19
 of Chapter 14 of Richmond City Code 1910 Concerning the Assess-
 ment of Property for Purposes of Taxation, the first of which sections,
 so far as applicable to the question here involved, provided that:

"17. The commissioner shall ascertain from each person or firm
 the market value on the first day of the fiscal year—"

And by section 19 of said Chapter it being provided as follows:

"19. He shall ascertain from the proper officers of all corporations
 and joint stock companies, except companies incorporated for the pur-
 pose of internal improvement, and banking associations organized
 under the laws of the United States, or incorporated under the au-
 thority of the State of Virginia, the amount of their capital and
 assets, not exempt from taxation, excluding that invested in real
 estate, or machinery or fixtures attached thereto, or in manufactures
 outside of the city, and shall require such officers of all bank-
 28 ing associations to record the number of the shares in their
 respective companies, and the market value of each share on
 the first day of the fiscal year."

By section 8 of Chapter 13 of Richmond City Code 1910 (p. 89)
 it is provided as follows:

"8. The fiscal year shall commence on the first day of February,
 and end on the last day of January."

Authority for the enactment of said several ordinances hereinbe-
 fore mentioned will be found in section 69 of the Charter of the City
 of Richmond, which is in the following language:

"69. For the execution of its powers and duties the city council may raise annually, by taxes and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the laws of this State and the United States; provided, however, that they shall impose no tax on the bonds of said city, nor on any capital invested in real estate or employed in manufacture outside the city limits, although the person or persons engaged in said business or manufactures have a place of business in said city. Neither shall they impose any tax at the same time upon the stock of the corporation, and upon the dividends thereon; nor upon any capital, interest, income or dividends when a license or other tax is imposed upon the business in which the capital is employed, or upon the principal, money, credit or stock from which the interest, income or dividend is derived. Said taxes shall be equal and uniform upon all property, both real and personal. The capital invested in all business operations shall be assessed and taxed as other property. Assessments upon all stock shall be according to the market value thereof."

This section has been more than once construed to confer upon the City of Richmond the plenary power of taxation for municipal purposes. (Myers vs. City of Richmond, 110 Va. 605.)

3. It is not true, as alleged in the said petition, that the Commissioner of the Revenue of the City of Richmond acted under the authority of the ordinance of the Council of the City of Richmond, approved April 9, 1915, a portion of which is quoted in said petition in making and filing the report required by section 17 of the Revenue Bill of the State of Virginia, whereby he assessed against the petitioner the said taxes complained of, viz: \$18,-489.20, but, on the contrary, Respondent says that the said taxes at the rate named, to-wit, 1.40 on the hundred dollars, was assessed as above stated in pursuance of the said ordinance of February 13, 1906, which was in full force and effect on the first day of February, 1915, that being the beginning of the fiscal year as prescribed by ordinance. It is true, however, that the amount so assessed was arrived at by the said Commissioner of the Revenue in the manner prescribed by law, deducting from the reported aggregate of the Bank's capital, surplus and undivided profits amounting to \$1,441,293.97, the assessed value of its real estate amounting to \$111,050, and the indebtedness owed it by certain of its stockholders, amounting in the aggregate to the sum of \$11,321.86, which was a mode provided in order to ascertain the market value of the shares of stock in said bank, on which the assessment was made against such stockholders and not against the bank.

4. It is not true that the Commissioner of the Revenue when he delivered to the petitioner in June, 1915, a copy of the assessment list hereinbefore mentioned, was acting in pursuance of the act of the Legislature which became effective on June 18, 1915, nor was he acting under the said ordinance of April 9, 1915, in so doing, but, on the contrary, he was acting in pursuance of the statutes and ordi-

nances in force as of February 1, 1915, as aforesaid, and though it be true that the said petitioner paid the taxes to the City of Richmond due from the stockholders as aforesaid, one moiety thereof in the aggregate amounting to the sum of \$9,244.66 on the 17th day of June, 1915, and the other moiety thereof amounting to the same sum on the 22nd day of December, 1915.

5. Even though it were true that the assessment complained of in the petition was made in pursuance of section 3 of the ordinance of April 9, 1915, yet when the whole of said section is read and properly construed it will be seen that the same did not impose upon bank capital, surplus and undivided profits any tax, as alleged in the petition, for the last sentence of the said section clearly indicates that the tax to be imposed was not in fact a tax upon the bank, but only upon the shares of bank stock held by stockholders for which
30 they alone were liable and not the bank. The sentence referred to and unfortunately omitted in the quotation made by the petitioner in its petition, is as follows:

"The tax upon such shares of stock in any bank located and doing business in the city, shall be assessed and collected in accordance with the provisions of the act of the General Assembly of 1915."

But even though the part of the section quoted by the petitioner provides for the imposition of a tax upon "bank capital, surplus and undivided profits," contrary to the Constitution of the United States as charged in said petition, yet the same is separable from the rest and residue of the section and may be so declared, without in the quoted which is adequate to impose a tax upon the shares of stock least destroying the validity of that portion of said section above of banks, when read in connection with the other ordinances in *pari pateria* hereinbefore quoted, which tax, so imposed on shares of bank stock, has been uniformly held to be constitutional and valid both under the decisions of the highest court of this State and of the Supreme Court of the United States, so that inasmuch as such a tax has only been levied by the City of Richmond upon the shares of stock of banks and not upon the bank capital, surplus and undivided profits, said tax is legal and constitutional. In this connection it is proper to say that the administrative officers of the City of Richmond, though acting under said ordinance of April 9, 1915, in effect ignored so much of said ordinance as it is alleged required the imposition of a tax on capital, surplus and undivided profits, by failing to so assess any bank or banking association doing business in the City of Richmond.

6. Respondent denies the allegation in said petition made that the assessment and levy of the said tax complained of was illegal and erroneous because assessed and levied by it in *solido* against the petitioner itself upon the aggregate of its capital, surplus and undivided profits less deductions, and on that account was a tax upon the capital of the bank, contrary to section 5219 of the Revised Statutes of the United States, and contrary to certain statutes of the State particularly mentioned in said petition.

31 7. Respondent denies the averment in the said petition made that the said tax was illegal and erroneous in that it violated section 1040-a of the Code of Virginia 1904, and particularly that part of section 1040-a in permitting your Respondent in common with other cities and counties of the State, to tax the capital stock of banks, National and State, located within their territorial limits, because said statutes restricted the City to the same right of taxation upon shares of stock as would be assessed upon other monied capital in the hands of individuals residing in the City of Richmond, the effect of which statutes restricted Respondent to the insignificant tax of only thirty cents on the hundred dollars of value on all intangible personal property within its jurisdiction, less the indebtedness of the owners thereof, thereby, as alleged, grossly discriminating against the capital of banks and their shares of stock, in favor of other monied capital in the hands of individuals residing in the City of Richmond, "in flagrant disregard of the express prohibition contained by said section 1040-a."

8. Respondent denies the allegation in said petition made that the assessment made by Respondent upon the shares of stock as hereinbefore stated violated that part of section 168 of the Constitution of Virginia which requires that "all taxes whether state, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"; but, on the contrary, Respondent says that in making this classification in said petition mentioned shares of bank stock it acted constitutionally and legally.

9. Respondent admits that the petitioner is a National Banking Association, but denies the allegation that shares of stock in the hands of stockholders cannot be legally taxed in the manner provided by the statutes of the State and the ordinances of the City of Richmond in force as of February 1, 1915.

10. Respondent neither admits nor denies the allegation in the said petition made as to what the State of Virginia did or omitted to do for the year 1915 in regard to the levying and assessment of taxes under sections 17, 18 and 19 of the State Revenue Bill as then in force, and therefore calls for strict proof of the same so far as the same may be relevant to the issues in these proceedings.

32 11. Respondent neither admits nor denies the allegations in said petition made concerning the number of National Banking Associations doing business in the City of Richmond and the aggregate amount of the capital of such institutions or associations, the assessed value of the real estate owned by such associations respectively, the number and value of shares of stock of such associations held by persons residing in the City of Richmond and without the City of Richmond; the number of State banks and trust companies doing business in the City of Richmond, the aggregate amount of their capital, surplus and undivided profits, etc., or the rate of tax assessed thereon for the year 1915, and the statement in said petition made concerning the aggregate amount of intangible

personal property, consisting of bonds, notes and other evidences of debt, and the taxes assessed thereon, but concerning the same says that if these alleged facts, in the opinion of the court, be relevant to said issues, calls for strict proof thereof.

And now, having fully answered so far as it is advised it is proper to answer the said petition, Respondent says that should this Honorable Court overrule the motion of the Respondent to dismiss the said petition, and take cognizance of the said petition, that Respondent will undertake to show to the court that the report made by the petitioner on March 1, 1915, through its Cashier and Treasurer, Thomas B. McAdams, to the Commissioner of the Revenue of the City of Richmond is erroneous in this, that the reported surplus of the petitioner and the undivided profits are far in excess of the sums reported in said statement, a copy of which report is herewith filed as Exhibit "R" to be taken and considered as a part of this Answer; and will ask the court on the authority of *Commonwealth vs. Schmelz*, 114 Va. 364, to increase the assessment made upon the shares of stock belonging to the stockholders in the petitioner's bank, and to levy a tax upon such increased value at the rate of 1.40 on the one hundred dollars of assessed value as provided by the ordinances of the City of Richmond.

And Respondent prays to be hence dismissed with its reasonable costs, etc.

CITY OF RICHMOND,

By _____,
Mayor City of Richmond,

H. R. POLLARD,
City Attorney, p. d.

33 CITY OF RICHMOND, *To wit:*

I, _____, a Notary Public for the City aforesaid in the State of Virginia do certify that George Ainslie, Mayor of the City of Richmond, whose name is signed to the foregoing answer, made oath before me that the statements therein contained so far as made on his own knowledge are true, and so far as made on the information of others he believes them to be true.

Given under my hand this — day of March, 1917.

Notary Public,

The following is a copy of Exhibit "R," referred to in the foregoing Answer.

(Here follows paster marked page 34.)

EXHIBIT "B"
REPORTBANK, BANKING ASSOCIATION, TRUST OR SECURITY COMPANY
February 1st, 1913.

Capital.....\$ 200,000

Surplus.....1,040,000

Undivided Profits.....

213,013.81

Aggregate.....\$1,443,023.81

No. of Shares.....\$111,050.00

Divide by number of all the shares to ascertain the value of each share.....\$1,331,983.81

Report of Merchants National Bank, located at Richmond, Va., in the State of Virginia, of the share or shares of each stockholder, and the actual value of the same on the first day of February, 1913.

Name of the President, John P. Branch.

Name of Cashier (or Treasurer), Thom. B. McAdams.

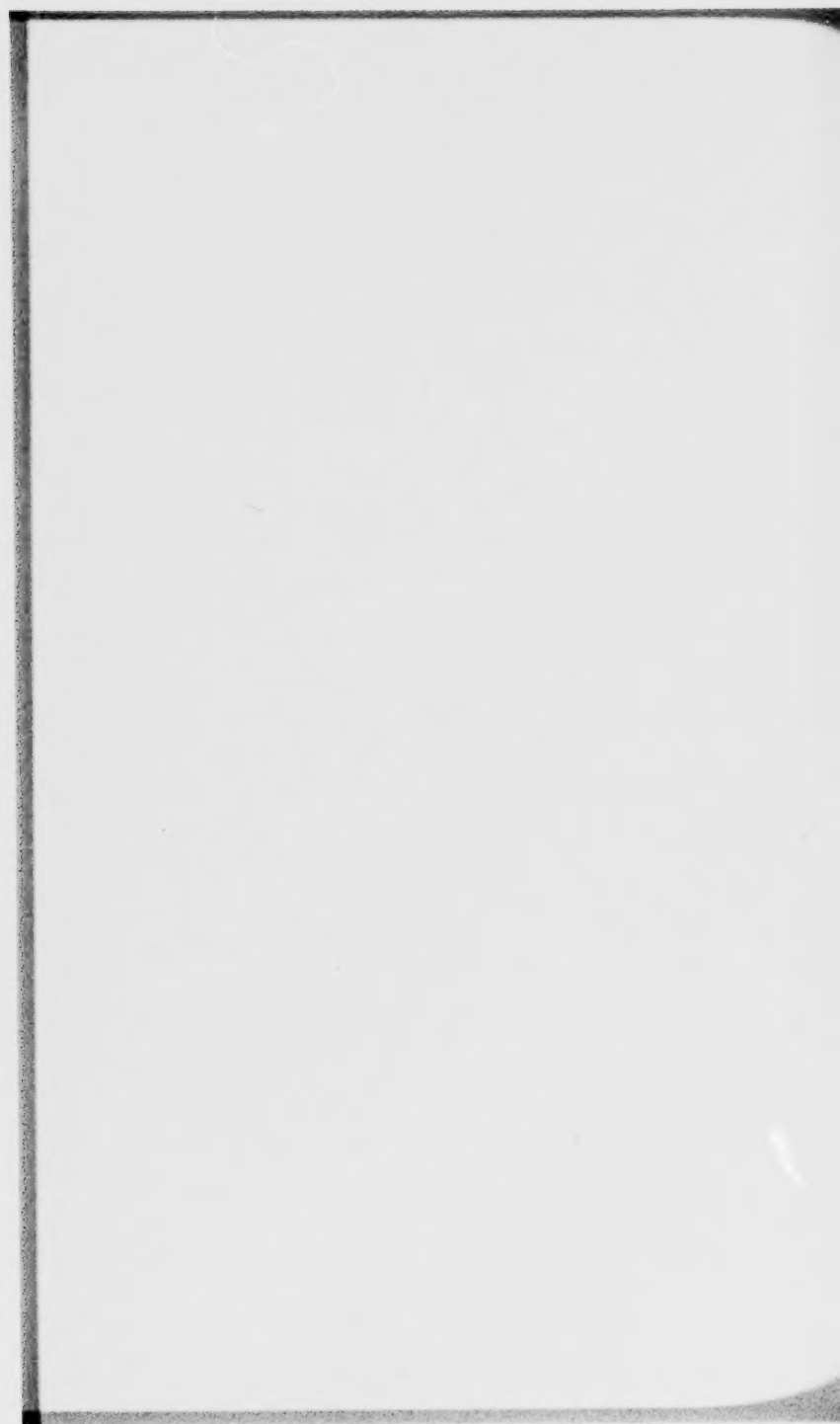
(See Note 2, below.)

Deduct assessed value of real estate taxed in this State, owned by the above named Bank, Banking Association, Trust or Security Company.

Divide by number of all the shares to ascertain the value of each share.

NAME OF STOCK- HOLDER	RESIDENCE OF STOCK- HOLDER	Number of shares of stock owned or held or controlled by each stockholder.	Par value of each share of stock.	Actual value of each share of stock estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate in this State.	Aggregate of actual value of the shares of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate in this State.	Amount of all bonds, demands and claims owing by each stockholder as principal debtor not otherwise deducted from his taxable account, not including any money due on account of the purchase of non-taxable securities. (See Note 1, below.)	Actual value of the shares of stock of each stockholder, after deducting amount of bonds, etc., entered in the preceding column from aggregate of actual value of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate in this State.
Branch, Jno. P.	Richmond.	774	\$ 100 00	\$ 665,992	\$ 515,477 81		\$ 515,477 81
Thos. & Co.	"	255			176,487 88		176,487 88
John Aiken	"	10			6,659 92		6,659 92
Mrs. Beulah G.	Pauling, Dutchess Co., N. Y.	80			53,279 36		53,279 36
John Kerr	"	11			7,325 91		7,325 91
John W.	Richmond.	11			27,305 67		27,305 67
Bliss W.	Paris, France	41			665 99		665 99
Miss Louise	Pauling, Dutchess Co., N. Y.	14			9,323 80		9,323 80
M. C.	Richmond.	10			6,659 92		6,659 92
Rogert, Mrs. Hibernia C.	Cartersville, Va.	11			7,325 91		7,325 91
Boykin, Mrs. Ellen B.	Richmond.	17			11,321 86		11,321 86
Boykin, Anna Brown.	"	17			11,321 86		11,321 86
Boykin, Ellen Pittfield.	"	17			11,321 86		11,321 86
Boykin, M. Godwin.	"	17			11,321 86		11,321 86
Butler, Mrs. Mary C.	"	16			3,965 93		3,965 93
Butler, Jno.	"	40			39,959 52		39,959 52
Crouch, Mrs. Mary A.	"	35			23,309 72		23,309 72
Campbell, Mrs. Mary Scott.	"	2			5,327 94		5,327 94
Dance, Mrs. Ellen J.	"	8			1,331 98		1,331 98
Dooley, Jas. H.	"	20			13,319 84		13,319 84
Gerace, Dr. A. Spiers.	"	51			33,965 59		33,965 59
Garrett, Miss Lottie C.	Williamsburg, Va.	8			5,327 94		5,327 94
Gibson, W. D.	Richmond.	5			3,329 96		3,329 96
Glasgow, Mrs. Margaret B.	London, England.	10			6,659 92		6,659 92
Totals.		1,494			\$ 994,992 04		\$ 994,992 04
Bro't forward.							
Ivord, Mrs. Roberta J.	Roanoke, Va.	1,494	\$ 100 00	\$ 665,992	\$ 994,992 04		\$ 994,992 04
Jameson, Mrs. Mamie J.	"	4			2,663 97		2,663 97
Johnson, J. D.	"	2			1,331 98		1,331 98
Jennings, Mrs. Nannie F.	Richmond.	2			1,331 98		1,331 98
Johnson, Camron	"	3			665 99		665 99
Keese, Geo. H.	"	4			1,997 97		1,997 97
McAdams, Thos. B.	"	3			1,997 97		1,997 97
McAdams, Mrs. Edna M.	"	17			11,321 86		11,321 86
McAdams, Mrs. Sallie R.	"	1			665 99		665 99
Karcuse, Milton E.	"	10			6,659 92		6,659 92
Munford, Rev. M. C. B.	"	10			6,659 92		6,659 92
Munford, Mrs. M. F.	"	10			6,659 92		6,659 92
Munford, Mrs. T.	"	30			33,299 60		33,299 60
Moore, Sam'l	Wakefield, Va.	2			16,649 80		16,649 80
Moore, Mrs. Sallie	Richmond.	10			19,979 76		19,979 76
Pugh, Leigh R.	Charleston, W. Va.	1			1,331 98		1,331 98
Roller, Mrs. Carrie B.	"	1			6,659 92		6,659 92
Ruthruff, Mrs. E. M. W.	Salem, Va.	50			6,659 92		6,659 92
Scott, Mrs. Sarah F.	Richmond.	10			33,299 60		33,299 60
Scott, Fredk. R.	"	25			16,649 80		16,649 80
Scott, Execut. Estate of F. R.	"	30			19,979 76		19,979 76
Scott, Fredk. W.	"	35			36,629 56		36,629 56
Scott, Francis B.	"	35			23,309 72		23,309 72
Scott, Geo. Cile.	"	40			29,639 68		29,639 68
Totals.		1,839			\$ 1,238,079 09	\$ 16,163 00	\$ 1,228,757 23
Bro't forward.							
Scott, Geo. W., Trustee.	New York.	1,839			\$ 1,238,079 09		\$ 1,238,079 09
Geo. W.	"	20			13,319 84		13,319 84
Thos. B.	Richmond.	5			3,329 96		3,329 96
Thos. B. Cile.	"	55			36,629 56		36,629 56
Scott, Mrs. Mary Wingfield.	Baltimore, Md.	23			15,317 82		15,317 82
Sanderson, Mrs. Kate B.	"	12			7,991 90		7,991 90
Stringfellow, Blair B.	Dissondale, Gloucester Co., Va.	2			1,331 98		1,331 98
Stringfellow, Margaret B.	Richmond.	3			1,997 98		1,997 98
Maud W.	"	3			1,997 98		1,997 98
Tennant, W. Brydon.	"	3			1,331 98		1,331 98
Virginia Trust Co., Trustee.	"	3			1,997 98		1,997 98
White, Wm. H.	"	10			6,659 92		6,659 92
Totals.		2,000			\$ 1,331,983 97	\$ 16,163 00	\$ 1,320,663 11

COPY. A true copy.



35 And at another day to-wit: At a like Hustings Court, continued by adjournment, and held for the said City at the Courthouse on the 3rd day of August, 1917, heretofore, to-wit: on the 5th day of February, 1917, came the Merchants National Bank of Richmond by its Attorneys, and having first given due notice in writing thereof to the City of Richmond and to H. E. Tresnon, Commissioner of the Revenue for said City, filed in open Court under section 571 of the Code its Petition, wherein it was alleged that the assessment and collection of the tax by the said City of Richmond for the year 1915, amounting to \$18,489.20 in said Petition complained of, was illegal and erroneous for the reasons therein set forth, and prayed that said assessment be corrected so as to conform to the law, and that the part of said tax in excess of that authorized by law, amounting to \$14,527.28 be refunded by said City of Richmond.

And said Petition having been duly docketed and continued thereafter, to-wit: on the 14th day of March, 1917, came the City of Richmond by its Attorney, and filed in open Court its written Motion to dismiss said Petition, and likewise its Answer to said Petition, to which motion and Answer Petitioner, by leave of Court, filed a general replication in the nature of a general denial or traverse of the allegations of said Motion and Answer; and thereupon the said H. E. Tresnon, Commissioner of the Revenue of said City of Richmond, was called by Petitioner and examined as a witness, and other evidence was heard on said Petition, and the case having been fully argued orally and in writing by the Attorneys for the Petitioner as well as by the Attorneys for the City of Richmond, the Court took time to consider of its judgment; and thereafter, at a subsequent term, to-wit: on the 1st day of August, 1917, the Court delivered its opinion in writing (which is hereby made a part of the Record) declaring that the levy, assessment and collection by the City of Richmond of the tax for the year 1915, in the Petition complained of, is illegal and erroneous (1) because said tax, instead of being levied and assessed against the shareholders of Petitioner, upon the value of their shares, ascertained in the manner prescribed by law, was levied and assessed after the Ordinance of said City, approved April 9th, 1915, had become operative and was in force, and was levied and assessed by and pursuant to the express terms of said Ordinance, and as so levied and assessed was a tax in solido directly against Petitioner
36 itself upon its capital, surplus and undivided profits less the assessed value of its real estate and other deductions allowed by law, contrary to the express prohibition contained in the Revenue Bill of the State of Virginia then in force, and (2) because instead of being at the legal rate of 30 cents on each \$100 of the assessed value of the shares of Petitioner, said tax was levied, assessed and collected at the illegal rate of \$1.40 on each \$100 of such value.

And it is accordingly so ordered; and the Court proceeding by consent of all parties by counsel nunc pro tunc to correct the levy and assessment of said tax of the City of Richmond for the year 1915 so as to conform to the law then in force as declared in its opinion, doth ascertain the aggregate amount of the taxes due by the shareholders of petitioner for said year to be \$3,961.92; and it is

hereby ordered that said amount of \$3,961.92 be deducted from the sum of \$18,489.20 paid by petitioner under said illegal and erroneous assessment and that the same be treated as payment in full of said tax for the year 1915 due the said City of Richmond under said corrected assessment thereof and that petitioner do recover of said City of Richmond the balance of the sum so illegally paid by it remaining after said deduction, to-wit, the sum of \$14,527.28 and that the same be refunded to it by the Treasurer of said City of Richmond, but without interest; and it is further ordered that petitioner do recover of the said City of Richmond its cost in this behalf expended.

And the City of Richmond by its attorneys thereupon moved the Court to set aside its said judgment on the ground that the same was contrary to the law and the facts and to grant it a rehearing, which motion the Court overruled; and thereupon the said City of Richmond by its attorneys excepted to the action of the Court in that respect.

And the City of Richmond having signified its intention of applying for a writ of error to said judgment, by the consent of parties entered of record a period of ninety days from the date of this order was allowed for the signing and filing of certificates or bills of exceptions, and the execution of this order is suspended for a period of four months from this day, and the giving and filing of a suspending bond is waived by petitioner.

The following is a copy of the opinion of the Hon. D. C. Richardson, Judge of the Hustings Court of the City of Richmond, referred to in the foregoing order of August 3rd, 1917:

VS.

CITY OF RICHMOND.

Motion to Correct an Alleged Erroneous Assessment for Taxes.

The Merchants National Bank of Richmond filed its petition in this Court on February 5th, 1917, alleging that it had been aggrieved by the erroneous and illegal assessment and collection of a tax by the City of Richmond amounting to \$18,489.20 for the year 1915. It was further alleged in the petition that said tax was assessed against the bank in solido upon its capital, surplus and undivided profits, under authority of an ordinance of the City of Richmond approved April 9, 1915, and not upon the shareholders of the bank. It is also alleged and insisted in the petition that, "even if said tax should be held to have been, in effect, levied and assessed against the shareholders of the bank on the value of their shares, in the manner prescribed by law," such levy and assessment was illegal and erroneous in that it violated section 1040-a of the Code of Virginia (1904) and section 168 of the Virginia Constitution and also section 5219 of the Revised Statutes of the United States.

Petitioner therefore prays that the alleged illegal and erroneous assessment be corrected so as to conform to the law, and that so much

of the said tax as was improperly assessed and collected be refunded to it by the City of Richmond.

In the answer of the City of Richmond, which is in writing and was filed March 14, 1917, the City by its attorney moves the Court to dismiss the proceedings on the ground that the petitioner has no standing in this Court under the law to make the motion to correct the assessment, it being alleged that the assessment was against each individual stockholder holding or owning stock in said bank, and that petitioner had no pecuniary interest in the case, and was not aggrieved by reason of said assessment.

Respondent denies that the assessment was made for the year 1915 under and by virtue of the ordinance of the City of Richmond, approved April 9, 1915, but avers that it was made as of February 1, 1915, in conformity with the statute, and in pursuance of sections 1 and 3 of an ordinance which became a law February 13, 1906, and which is embodied in Richmond City Code 1910, as sections 1 and 3 of Chapter 15, "Concerning the Levying of Taxes."

Respondent further contends that though it were true that the assessment complained of was made in pursuance of section 3 of ordinance of April 9, 1915, yet when the whole of said section is read and properly construed, it did not impose any tax upon bank capital, surplus and undivided profits, but only upon the shares of bank stock held by stockholders, and quoted the last sentence of the ordinance of April 9, 1915, in support of such contention.

It is further contended that even though the part of section 3 of the ordinance of April 9, 1915, quoted by petitioner, provides for the levying of a tax upon "bank capital, surplus and undivided profits," yet the same is separable from the rest and residue of the section without destroying the validity of that portion of the section which is adequate to impose a tax upon the shares of stock of banks, and in this connection says that the administrative officers of the City of Richmond, though acting under said ordinance of April 9, 1915, in effect ignored so much of said ordinance, as it is alleged, imposed a tax on capital, surplus and undivided profits, by failing to so assess any bank or banking association doing business in the City of Richmond.

Respondent further denies that in the assessment of this tax the City of Richmond violated section 168 of the Constitution of Virginia, or section 1040-a of the Code of Virginia (1904) or section 5219 of the Revised Statutes of the United States.

The first question therefore to be decided arises upon the motion by the City to dismiss these proceedings, which motion is in the nature of a plea in bar. The determination of that question leads to the inquiry—whether this assessment was made against the stockholders of the bank upon the shares of the stock held by them, respectively, or upon the bank in solido, upon its capital, surplus and undivided profits. If it was an assessment against the stockholders, then it seems from the authorities cited, that the bank would have no right to file this petition and the same should be dismissed; but if the assessment was made against the bank upon its capital, surplus

and undivided profits, then the right of the bank to file this petition and ask for relief must be maintained.

It is earnestly insisted by the City that this assessment was made as of the first day of February, 1915, the beginning of its fiscal year, under an ordinance of the City approved February 13, 1906, which was then in force, and not under the provisions of the ordinance which did not become a law until April 9, 1915, and that the assessment was against the stockholders under the provisions of the first mentioned ordinance and not against the bank.

In the consideration of this question it is proper to inquire: What is meant by the phrase—assessment or levying of taxes?

The assessment of personal property for taxation involves: first—the ascertainment of the character and value of the property; second—the fixing of the rate prescribed by law; and third—the extension of the amount of the tax.

The ordinance of the City does prescribe that the Commissioner shall ascertain the value of the property as of the first day of February of the year for which the assessment was made, but does not prescribe when the assessment shall be made, nor does it anywhere say that the rate of taxation shall be the same as that prescribed by the ordinance in force on the first day of February of the year for which the assessment was made. It frequently occurs that the rate of taxation is changed after the beginning of the fiscal year, and before the assessment is actually made, and the right of the City to do so has never been controverted.

The ordinance of February 13, 1906, under which it is claimed this assessment was made became a law after the first day of February, 1906, and by its terms it applied to the assessment for that year.

In this case I am of opinion that this assessment was made after the ordinance of April 9, 1915, became a law, and that it was made thereunder and according to its provisions.

To decide otherwise, that is, to hold that the assessments for the year 1915 should have been made under the ordinance in force on the first day of February, of that year, would lead to great confusion and loss on the part of the City. Under the ordinances of February 13, 1906, the rate of tax on real estate and tangible personal property was \$1.40 on the \$100.00 of value. Under the ordinance of April 9, 1915, the rate on the same classes of property was raised to \$1.65 on the \$100.00 of value, and taxes on that class of property at the last mentioned rate were imposed and collected for the year 1915. If the ordinance of April 9, 1915, did not apply to the assessments for that year, then every person who paid taxes on real estate and tangible personal property for 1915 would have

40 the right to demand that the excess be refunded to him.

Finding, therefore, that the assessment was made under the provisions of the ordinance of April 9, 1915, the next inquiry will be, upon whom or on what subject was the assessment made, whether upon the bank or upon the stockholders.

The language of the ordinance so far as it is applicable to this question reads as follows:

"There shall be levied and collected for each fiscal year the taxes following, to-wit: * * * on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital, surplus and undivided profits, one and fifteen-hundredths per centum of value, provided, that for the year 1915 the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value; * * *"

This language is plain, unambiguous and susceptible of only one interpretation, and the Court will not be justified in straining its construction to find some hidden meaning. The Commissioner says that when he made the assessment the ordinance of April 9, 1915, was in force and before him for his guidance, and the property book in his office shows that the assessment was as follows:

"Merchants National Bank, 1915, value \$1,320,662.11, tax on that value \$18,489.20."

I am of opinion, therefore, that this assessment by the City for the year 1915 was made under the provisions of the ordinance of April 9, 1915, that it was upon the capital, surplus and undivided profits of the Merchants National Bank, and that said bank has the right to file its petition and to be heard in this Court on its motion to correct the said assessment.

On the question as to the legality of this assessment, I believe the correctness of the following propositions will be admitted without the citation of authorities:

First. No assessment for taxes can be made by a municipal corporation except under a law, rule or regulation which is commonly called an ordinance.

41 Second. That such ordinance to have any force must be the lawful exercise of the taxing power conferred upon the *municipally* by the Constitution, or by the General Assembly.

Third. That under the laws of this Commonwealth no tax can be assessed or levied upon the capital of any bank.

As the ordinance of April 9, 1915, undertook to authorize the levy of a tax upon the capital, surplus and undivided profits of the Merchants National Bank for the year 1915, I am constrained to decide that the part of the ordinance heretofore quoted is invalid, and that the assessment made thereunder is illegal and void.

But it is further insisted by the City that although the provisions of the ordinance assessing a tax upon the capital, surplus and undivided profits of the bank may be declared void, that the provisions of said ordinance are separable and enough remains valid to authorize a tax upon the stockholders.

It is true that the Court may declare a statute unconstitutional in part, or an ordinance invalid in part, without impairing the constitutionality or validity of the remaining portion if cognate and coherent.

While I do not undertake now to decide as to the validity of any other provision of the ordinance, I am of opinion that the validity of the remaining portion of the ordinance under review would not be impaired by the elimination merely from the third section of the words just quoted. After the elimination of such words the ordinance would then read:

"An Ordinance.

Approved April 9, 1915.

To amend and reordain sections 2 and 3 of chapter 15, Richmond City Code concerning the levying of taxes.

Be it ordained by the Council of the City of Richmond.

That sections 2 and 3 of chapter 15, Richmond City Code 1910, be amended and reordained so as to read as follows:

Sec. 1. (In the original ordinance.) There shall be levied and collected for each fiscal year the following taxes, to-wit:

2. On all real estate, tangible personal property, and rolling stock of railways, other than steam roads, not exempt from taxation, one and sixty-five hundredths per centum of value.

3. On all intangible personal property, including bonds and stocks, three-tenths per centum of value; on capital employed in business, not otherwise taxed as intangible personal property, one and four-tenths per centum of value. The taxes upon such shares of stock in any bank located and doing business in the City, shall be assessed and collected in accordance with the provisions of the Acts of the General Assembly of Virginia of 1915.

This ordinance shall be in force from its passage."

Under the last sentence of the ordinance as it would then stand, there is ample authority for the assessment upon shares of stock of any bank located and doing business in the City, but such assessment must be made in the manner prescribed by the statute.

It will be observed that the ordinance does not, either in the eliminated provision or otherwise, prescribe any rate of taxation, specifically, on "shares of stock in any bank," but the 3rd section does prescribe that on all intangible personal property, including bonds and stocks, the rate of taxation shall be three-tenths per centum of value.

I am of opinion that the petitioner, the Merchants National Bank, should be exonerated from the payment of the taxes assessed by the City of Richmond for the year 1915 upon its capital, surplus and undivided profits, and that the sum thus paid should be refunded to said bank.

And this Court in order to do what the Commissioner of the Revenue of the City of Richmond should have done at the time of mak

ing the assessment, will enter an order directing said Commissioner to ascertain the names and residences of each stockholder of said bank with the number of shares of stock held by each of them, the value of the stock as of the 1st day of February, 1915, and assess said stock in the manner prescribed by law, at the rate of three-tenths per centum of the value of such stock.

The arguments of Counsel on the questions as to whether the ordinance violates the provisions of section 168 of the Constitution of Virginia with reference to the equality of taxation, or the statutes of this state or of the United States by discriminating unlawfully against bank stocks, and in favor of other moneyed capital, have been able and illuminating, but, in the view I take of the case, a decision of these questions is unnecessary.

And now at this day, to-wit: At a like Hustings Court, continued by adjournment and held for the said City at the Courthouse, on the 3rd day of October, 1917 (being the same day and year first hereinbefore written), the City of Richmond, by H. R. Pollard, City Attorney, in accordance with the leave of the Court heretofore granted, this day filed its three Bills of Exceptions, which are received, signed and sealed by the Court, and made a part of the record in this case; which said Bills of Exceptions are in the words and figures following, to-wit:

MERCHANTS NATIONAL BANK OF RICHMOND

vs.

CITY OF RICHMOND.

City's Bill of Exception No. 1.

Be it remembered that at the trial of this case, after all of the evidence introduced on behalf of the plaintiff and of the defendant had been heard, which evidence is incorporated in and made a part of the City's Bill of Exceptions No. 2, to which reference is hereby expressly made, the City of Richmond moved the court to dismiss these proceedings on the grounds set forth in its answer to the petition of the plaintiff, but the court overruled said motion and refused to dismiss said proceedings, to which action of the court the City of Richmond excepted and now files this its Bill of Exceptions No. 1, which it prays may be signed, sealed, enrolled and made a part of the record, which is accordingly done, this 3d day of October, 1917.

D. C. RICHARDSON, [SEAL.]
Judge,

VIRGINIA:

In the Hustings Court of the City of Richmond.

MERCHANTS NATIONAL BANK OF RICHMOND

VS.

CITY OF RICHMOND.

City's Bill of Exception #2.

Be it remembered that at the trial of this case, after all
44 the evidence introduced on behalf of the plaintiff and of the
defendant had been heard by the court, the court entered
the order of August 3, 1917, copied as a part of the record in this
case, to the entry of which order the City of Richmond objected on
the ground that the plaintiff has not shown itself entitled to the
redress prayed for in its petition, but the court overruled said
objection and entered said order, to which action of the court the
City of Richmond excepted, and now files this, its Bill of Excep-
tions No. 2, which it prays may be signed, sealed, enrolled and made
a part of the record, which is accordingly done this 3rd day of
October, 1917.

And the court certifies the following as all of the evidence in this
case, introduced on behalf of the plaintiff and of the defendant.

By Mr. Page: I wish to offer in evidence an ordinance of the
City of Richmond, approved April 9, 1915, entitled "An ordinance
to amend and re-ordain sections 2 and 3 of Chapter 15, Richmond
City Code, 1910, concerning the levying of taxes," which I ask
may be filed as Exhibit "A." Said ordinance is as follows:

An Ordinance.

(Approved April 9, 1915.)

To Amend and Re-ordain Sections 2 and 3 of Chapter 15, Richmond
City Code, 1910, Concerning the Levying of Taxes.

Be it ordained by the Council of the City of Richmond:

1. That sections 2 and 3 of Chapter 15, Richmond City Code, 1910,
be amended and re-ordained so as to read as follows:

2. On all real estate, tangible personal property and rolling
stock of railways, other than steam roads, not exempted from taxa-
tion, one and sixty-five one-hundredths per centum of value.

3. On all intangible personal property, including bonds and
stocks, three-tenths per centum of value; on bank capital, surplus
and undivided profits, less assessed value of real estate included
in said capital and surplus and undivided profits, one and fifteen-

5 hundredths per centum of value, provided that for the year 1915 the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value; on capital employed in business, not otherwise taxed as intangible personal property, one and four-tenths per centum of value. The taxes upon such shares of stock in any bank, located and doing business in the city, shall be assessed and collected in accordance with the provisions of the Acts of General Assembly of Virginia of 1915.

2. This ordinance shall be in force from its passage.

By Mr. Pollard: I object to the introduction of this ordinance as being irrelevant, the taxes in question being, levied under the ordinance which was in force on the first day of the fiscal year 1915.

By the Court: The ruling of the court is reserved for the present as to the admissibility of this ordinance.

H. E. TRESNON, a witness of lawful age, introduced on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Pickrell:

Q. You are an officer of the City of Richmond, are you not?

A. Yes.

Q. What officer?

A. Commissioner of the Revenue.

Q. Were you such officer in 1915 and the preceding year.

A. Yes.

Q. Did you make the assessment of taxes in 1915 of banks?

A. I made the assessment from the reports received from the banks.

Q. The year 1915 was the year in which the extra session of the Legislature was held, was it not, in which segregation was determined upon?

A. Yes.

Q. Did that delay the assessment of taxes upon the banks?

A. No, it did not materially delay the report of the banks for 1915.

Q. You say you assessed the banks for that year?

A. Yes.

46 Q. The Merchants National Bank of the City of Richmond among others?

A. Yes.

Q. Was that assessment made under the ordinance of April 9th, 1915?

A. That assessment was made under the ordinance in force as of the 1st of February on banks.

Q. Why do you say that? Wasn't the ordinance of April 9th, 1915, in force when you actually made the assessment?

A. When I actually made the assessment?

Q. Yes.

A. The ordinance was at the same rate of taxation as under the one prior to 1915 on April 9th.

Q. You did not answer my question. My question was: Didn't you make your assessment under the ordinance of April 9th, 1915? Wasn't that ordinance in force when you did make the assessment?

A. I made the assessment before that ordinance. The report of the bank was complete before that ordinance was in effect. It wasn't in my power to change it.

By Mr. Pollard: I object. That is a legal question.

Q. Have you got with you your personal property book for 1915?

A. No, sir.

Q. Can you produce it?

A. Yes, I can produce it.

Q. I wish you would produce that book and read the assessment of the Merchants National Bank of Richmond.

A. I will do so.

(Witness produces property book for 1915.)

Q. Have you produced the personal property book for the year 1915 in accordance with my request?

A. Yes.

Q. Will you please turn to that book and read the entry upon it relating to the assessment of the Merchants National Bank for 1915?

A. "Merchants National Bank, 1915, value \$1,220,662.11; tax on that value \$18,489.20." on the City personal property book for 1915.

Q. Is that the entry of the assessment here in question?

A. Yes.

47 Q. The first figure stated is the amount upon which the tax was assessed?

A. Yes; value.

Q. And the figure last stated—

A. Is the tax on that value at \$1.40.

Q. Is not the personal property book from which you have just read those entries the book upon which all assessments are entered for the City of Richmond?

A. All personal property assessments.

Q. In other words, it is the assessment roll of the City of Richmond for personal property?

A. For personal property in one particular book of that subsection of Madison Ward—only a part of it, of course.

Q. When do you return your assessment to the Auditor?

A. To the Auditor?

Q. Yes, the State Auditor?

A. I have to return them before the 1st of June—just as rapidly as I can. I send them just as fast as I make them up. They are due on the 1st of June.

Q. Does the report that you file show a date?

A. Yes, it shows the date that I made the report to the Auditor—to the State Auditor.

Q. When did you make this entry on the personal property book which you read out to the court?

A. I could not tell you the date it was made, but that book was not finished—I turned it over to the Treasurer in 1915 on the 9th day of July. It took some time to finish it up. I cannot say exactly when that particular entry was made.

Q. When you made the assessment of the Merchants National Bank about which you are testifying did you have the ordinance of the City of Richmond of April 9th, 1915, before you?

A. At that time?

Q. Yes.

A. I couldn't say whether I had it or not.

Q. Please look at the ordinance, and particularly that part of it as to the tax being \$1.15 and where it declares that for the year 1915 it shall be \$1.40, and say, after refreshing your mind, whether you did not have that ordinance before you when you made that assessment.

A. Yes, I had that ordinance.

Q. You did not get a copy of the ordinance before it was in force and operation, did you?

A. No, sir.

48 Q. When you made the assessment you had the ordinance before you and that ordinance was in force and operation, was it?

A. This ordinance was in operation for personal property and for intangible personal property for 1915.

Q. Including banks?

A. Not affecting banks for 1915 at the \$1.15 rate.

Q. But at \$1.40 for 1915?

A. Yes.

Q. And you had it in hand and it was then operative when you made that assessment?

A. Yes.

By Mr. Pollard: I move to strike that out as to whether it was operative or not as being improper. That is a legal question as to whether it was operative or not.

Q. Are not the ordinances relating to taxation furnished you by the proper authorities in order that you may act upon them?

A. A copy of the ordinance is furnished the office, yes.

Q. Was not that particular ordinance furnished you by the City Clerk?

A. This ordinance was furnished the office by the Clerk.

Q. As an ordinance in force?

A. As an ordinance approved on a certain date.

Q. And to be acted upon by you as Commissioner of the Revenue of the City of Richmond?

By Mr. Pollard: I object.

Q. This ordinance, as I understand it, was furnished by the City Clerk to you as an ordinance of the City of Richmond then in force, to be used by you in your official duties?

A. This ordinance was furnished me as an ordinance of the City of Richmond, approved April 9th, 1915. Each ordinance has to be furnished to the head of each department after it has been approved and printed.

Q. And this ordinance was in force when you made that assessment of the bank?

A. This ordinance was for my guidance.

Q. And was in force when you made the assessment?

A. It was approved and in force when the assessment was made.

Q. That was the ordinance that you followed when you made the assessment?

A. The assessment of banks?

49 Q. Yes.

A. I made the assessment at the \$1.40 rate, as the ordinance prescribed.

By the Court: What is the rate of taxation imposed under the ordinance of April 9th, 1915?

By the Witness: \$1.40.

By the Court: What is the rate imposed under the ordinance of 1906?

By the Witness: \$1.40.

By Mr. Page: I wish to offer in evidence the two tax receipts for 1915 for the City of Richmond, to be marked as Exhibits "B" and "C," respectively, which are as follows:

Note: No objection was made to the authenticity of these receipts.

City Taxes due in June. Five per cent. added on July 1st to all bills not whole or half paid.

Collector's Office.

\$9,244.60

City of Richmond, June 17, 1916.

Received of Merchants Nat. Bank Nine Thousand Two Hundred Forty Four and 60/100 Dollars, being One-Half of City Taxes 1915 charged to Their Shares Stock.

Take Notice—If the remainder is not paid in this office on or before the 31st of December, 1915, five per cent. will be added and the property reported delinquent.

H. L. HULCE,
Collector of City Taxes.

1915.

ank

Merchants National Bank

To City of Richmond,

Dr.

a/c Shares Stock	@ 1.40	
ity Tax on Personal Property		
held as above, for 1915.....	\$1,320,662.11	18,489.20
		9,244.60
		<hr/>
		9,244.60

Received payment,

Collector's Office, Dec. 22, 1915.

H. L. HULCE,
B. Collector.

By Mr. Page.

Q. Mr. Tresnon, from the personal property book for 1915 that you have just exhibited, can you state the aggregate amount of capital of all the State banks and trust companies in the City of Richmond, and also of all the national banks?

A. I can give the values upon which the tax was assessed on national banks. That was \$8,320,521.00 in value for 1915. The tax was \$116,487.20 at the rate of \$1.40. Now other than national banks the value was \$6,030,294.00. The tax on that value is \$84,254.40 at the rate of \$1.40.

Q. When you say "other than national banks" do you mean State banks?

A. That includes State banks, trust companies, and bank and trust companies.

Q. Can you state from the book above referred to the aggregate net amount of capital returned for taxation under the head of bonds, notes and other evidences of debt for the year 1915?

By Mr. Pollard: I object to that question on the ground that it is irrelevant.

By the Court: I sustain the objection to the question in the form in which it was asked, but it will be allowed the petitioners to show, if they can, that capital employed in competition with national banks has been discriminated against or favored.

By Mr. Pickrell: We except to the ruling of the court.

By Mr. Page: We further except to the ruling of the court on the ground that we called upon the City Attorney to give us his grounds of defense to our petition when this case was first called and he stated in your Honor's presence that we would receive his grounds of defense. I wish to offer in evidence, as Exhibit "D," his letter of March 6, 1917, to me, which is as follows:

Office of City Attorney.

Richmond, Va., March 6, 1917.

(In re Merchants National Bank vs. City of Richmond.)

Mr. Legh R. Page,
Attorney for Merchants National Bank,
City.

DEAR SIR:

I beg to acknowledge receipt of your favor of the 5th inst.
51 and to say that I have been engaged today, as far as it was possible to give attention to the preparation of the answer of the City of Richmond to your petition in the above entitled case, and I hope to be able to complete the same at some early hour to-morrow and will furnish you a copy of the same, which, I think, will give you the grounds of defense you desire.

I might as well say now, however, that under the authority of the case of Commonwealth vs. Schmeltz, 114 Va. 364, I shall ask the court to examine into the correctness of the assessment made by the Commissioner of the Revenue of the value of the shares of stock, and if found inadequate—that is below their value—to increase said valuation and to assess the tax thereon at the rate provided by law. In view of this situation it will become necessary to have the Special Accountant of the City of Richmond examine the books of your Bank at some convenient time in the near future.

Yours truly,

H. R. POLLA-D,
City Attorney.

By Mr. Page I also desire to file, as Exhibit "E," his letter to me of March 7, 1917, and which is as follows:

Office of
City Attorney.

Richmond, Va., March 7, 1917.

(In re Merchants National Bank vs. City of Richmond.)

Mr. Legh R. Page,
Attorney, City.

DEAR SIR:

I beg to inclose you herein carbon copy of the answer of the City of Richmond proposed to be filed in the above entitled case, which I think so fully states the line of the City's defense as to make it unnecessary for me to file additional grounds of defense.

52 In regard to the proposed stipulation of facts I beg to say that I prefer to have you show the facts you rely upon in evidence rather than to include same in a stipulation.

Kindly let me hear from you in regard to my request concerning the examination of the books of the Bank.

Yours very truly,

H. R. POLLARD,
City Attorney.

By Mr. Page: The answer filed by the City Attorney does not deny the allegation in the petition that bonds, notes and other evidences of debt are money capital in competition with money invested in shares of stock of national banks.

NOTE.—It is agreed that the witness, if allowed to answer the question, would have confirmed the allegations in the petition substantially in regard to the aggregate amount.

By Mr. Page:

Q. What was the rate of State taxation on intangibles for the year 1915?

By Mr. Pollard: I object as to intangibles.

By the Court: Objection overruled.

A. The rate on intangible personal property? Do you mean the broad word, intangible property?

Q. Yes.

A. The State rate or City rate?

Q. State rate.

A. In 1915?

Q. Yes.

A. There were two—65c. straight on intangibles, and included in intangibles was capital of corporations, firms and individuals.

By Mr. Pollard: Other than national banks.

A. (cont.). National banks were not included in that list because banks were taxed under a separate act entirely and they had to make their reports under a separate act; it does not go on the personal property book at all.

Q. The State tax for 1915 was assessed against national banks on the same aggregate as the City tax was assessed, was it not?

A. The 1915 assessment for the State was on capital, surplus and undivided profits, and the individual stockholders were allowed to deduct by giving in an affidavit the amount of bonds owing by them as principal debtor from their shares of stock held in such bank—by making that affidavit to the Commissioner of Revenue.

Q. I now repeat the question: State whether or not you did not follow or assess your tax on the same aggregate amount that the State based its tax on for 1915.

A. 1915 for City taxes?

Q. Yes.

A. No, sir, not in all cases.

Q. Answer the question.

A. No.

Q. What was the difference?

A. The difference was that in 1915 for City purposes the stockholders out of town were allowed to make deductions for local purposes against their stock. They could return the stock to the county where they resided and the value of the stock was taken from the aggregate value for City purposes.

Q. But the aggregate value was the same?

A. The aggregate values could not be the same as between State and City.

Q. The aggregate value before the deductions were made was the same?

A. The aggregate value before the deductions for county purposes was the same, yes.

By Mr. Pickrell:

Q. Mr. Tresnon, you assessed intangibles subject to taxation by the City of Richmond under this ordinance of April 9th, 1915, at the rate mentioned in the ordinance of three-tenths of one per centum, did you not?

A. Yes.

Q. That included bonds, notes and other evidences of indebtedness?

A. Yes.

Q. The amount of such bonds, notes and other evidences of indebtedness amounted to many million dollars, did it not?

A. Yes.

Q. Did you assess under the State Revenue Act intangible personal property within the limits of the City of Richmond—the State tax for 1915?

54 A. Yes.

Q. Upon intangibles, consisting of bonds, notes and other evidences of indebtedness at the rate of 65c. on the hundred dollars of value?

A. Yes.

Q. And upon bank capital, surplus and undivided profits at the rate of what?

A. On the capital, surplus and undivided profits reported to the office of the Commissioner of the Revenue on special reports made by the banks I assessed for that year at the rate prescribed in that bank act of 35c. on the shares of stock after arriving at the value of the stock by making the proper deductions as the law prescribed.

Q. So the total assessed against banks—City and State—was how much?

A. Continued, \$1.75.

Q. And the total assessed—City and State—upon intangibles, including bonds, notes and other evidences of debt, was how much?

A. The State rate was 65c. and the City rate was 30c. on other intangibles.

Q. Making a total of 95c.?

Q. Yes.

Q. The assessment of City taxes upon intangibles at the rate of 30c. on the hundred dollars, and the assessment of intangibles at the rate of 65c. for State purposes, making a total of 95c., was collected by the City and State, respectively, on the basis of this assessment for the year 1915, was it not?

A. Yes.

Q. And the tax- which you assessed against banks at the rate of \$1.40 per hundred dollars for local purposes or for City purposes and which you say you assessed for State purposes at the rate of 35c., were collected for the year 1915 on the basis of your assessment, were they not?

A. Yes.

Q. Did you ever notify any stockholder of the Merchants National Bank of this assessment?

By Mr. Pollard: I object to that as being irrelevant.

By the Court: Objection overruled.

A. No, sir.

Q. Did you ever render a bill to any stockholder?

A. No, sir. We are not required to render bills. We do not render bills to anybody.

55 Q. Or make any entry against them on your book?

A. I made no entry on the books at all against them.

Cross-examination.

By Mr. Pollard:

X Q. Mr. Tresnon, how long have you been Commissioner of the Revenue?

A. Since September, 1911.

X Q. Were you connected with the office of Commissioner of the Revenue of Richmond prior to that time?

A. From July, 1904, to September, 1911.

X Q. Is the mode which you adopted for the assessment of City taxes for the year 1915 on shares of bank stock the same that has been in vogue ever since you have been in the Commissioner of Revenue's office?

By Mr. Pickrell: Objected to as clearly irrelevant.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. On the same principle, yes.

X Q. Were the entries made similarly upon the books each year as the book you produced in court to-day?

A. Similar entries, yes.

X Q. Has there been entered upon any book the names of the shareholders or owners of the shares upon an assessment of City taxes?

A. Not to my knowledge.

X Q. Has it always been entered in the name of the bank?

A. Always has.

X Q. As you have exhibited to the court here to-day?

A. Yes.

X Q. There is filed a paper with the answer of the City of Richmond, marked Exhibit "R". Will you please examine that paper and say whether or not that was furnished you by the Merchants National Bank.

A. Yes, this is a copy of the original report made by the bank.

X Q. Was that report signed and sworn to by the cashier of the bank as the copy shows?

A. This report was signed by the cashier on the 1st of March, 1915, but there is no affidavit on the report furnished by the bank or by the cashier to the Commissioner of Revenue required. I see no affidavit on the report.

X Q. By whom was this paper, the original of which I now hand you from which the one just referred to was copied—by whom was that made out, in whose handwriting, if you know?

A. I don't know whose handwriting it is.

X Q. Was it made out in your office or made out at the bank?

A. The original was not made up at my office but the copy was. The original was made out at the bank.

X Q. Was it brought to your office?

A. Yes, it was brought to my office.

X Q. It bears date on March 1st, 1915.

A. Yes.

X Q. Was that the date, or about the date, it was filed in your office?

A. Yes, about that time.

X Q. It states on its face that it is a report made February 1st, 1915. Did you receive it or not as such?

A. I received it as a statement of February 1st—a bank statement.

X Q. On what date? When did you receive it?

A. March 1st—about March 1st.

X Q. Was there any ordinance in force, that you know of, that changed the system of taxation as of March 1st from what it had been since 1906?

By Mr. Pickrell: I object to the question. The ordinances speak for themselves.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. On the 1st of March there was no new ordinance in effect at that time.

X Q. Now who made this assessment in controversy here? Did you make that assessment in pursuance of the ordinance in force on the 1st of the fiscal year?

By Mr. Pickrell: The question is objected to because the witness has already testified he made it in pursuance of the ordinance of April 9th, 1915.

By the Court: Objection overruled.
By Mr. Pickrell: Exception.

A. I made out the assessment on the banks as the ordinance was force at \$1.40 because there was no change in the \$1.40 rate as February 1st, 1915.

X Q. This ordinance has this provision in it: "provided that for year 1915 the tax on bank capital, surplus and undivided profits all be one and four-tenths per centum of value". Did you make any assessment on the banks for the *the* year 1915 other than that assessment on shares of stock?

A. No other assessment.

X Q. Did you make any assessment under the ordinance that was force on February 1st of the capital, surplus and undivided profits the bank?

A. No, sir, I made no other assessment except at the \$1.40 rate.

X Q. On what?

A. As of February 1st, 1915.

X Q. Against the bank or against the stockholders?

A. We aggregated it against the stockholders and charged it up the cashier of the bank.

X Q. Why did you do that?

A. Because it has always been the custom.

X Q. Does not the statute require it?

A. Yes, sir.

X Q. Mr. Tresnon, the assessment book here on page 65, for the year 1915, Madison Ward, A #2, gives a list of banks. Included that list I find the Merchants National Bank and then there appears \$1,320,662.11. What does that mean? There is no heading the column under which I find that. What does that stand for?

A. Aggregate value of shares of stock of the Merchants National bank.

X Q. For what year?

A. For the year 1915, after making the proper deductions as prescribed by law.

X Q. I find opposite that, in another column, \$18,489.20. What does that represent?

A. That represents the tax on that value just read at \$1.40.

X Q. Now look at Exhibit "R" and state whether that corresponds with the book, and if not, what difference is there.

A. The value assessed there is the same value as was reported by the bank for taxation after they had made the proper deductions.

X Q. How long, to your knowledge, has the Merchants National bank been making reports similar to the one that was made in this case, and been paying taxes for its stockholders as they paid for the year 1915?

A. Since 1904, to my knowledge.

X Q. Since 1904 they have uniformly made a report like that and uniformly paid the tax?

A. Yes.

X Q. Have you ever had any objection from them on that account?

X Q. Did they ever call in question the constitutionality of the law under which they were acting?

By Mr. Pickrell: Excepted to as improper and irrelevant.

A. No, sir.

X Q. How long had the rate been \$1.40?

A. Since 1904, to my knowledge.

X Q. They were not only paying it in that manner, but at that rate?

A. Yes.

X Q. If there is any discrimination against them, how long has that discrimination existed?

By Mr. Pickrell: Objected to as clearly improper.

By the Court: Objection sustained.

X Q. Please look at the original return, which you say was made up by the bank at their banking house and returned to you bearing date on March 1st, 1915, and state whether or not there is not printed upon the back of that return a copy of the State statute regarding the taxation of banks and trust and security companies, which shows that Section 17 was amended as of January 30th, 1912, and that Section 18 was amended as of March 12th, 1908, and that remaining sections—19, 20, 21 and 22—were part of the act approved April 16th, 1903.

A. Yes, that law is printed on the back of the report.

X Q. By whom was that furnished?

A. That was furnished by the State Auditor.

X Q. How long has it been the practice to have the reports from banks made out on a form similar to that with the act printed on the back of it?

59 A. Since I have been connected with the office they have been made on similar reports furnished by the State for that purpose.

X Q. And with the law printed on the back of it?

A. Yes.

X Q. When this report was filed with you did the bank, or any representative of the bank, claim that they should seek or take advantage of the laws passed by the Legislature at the extra session of 1915?

A. No, sir, no objection was made.

By Mr. Pickrell: Objected to.

By the Court: Objection overruled.

X Q. How long has the fiscal year of the City of Richmond been from the 1st of February to the last day of January?

A. Since I can remember—since I have been connected with the office.

Court adjourned until 3:30 P. M.

Hustings Court of Richmond.

March 13, 1917, 3:30 P. M.

Court convened pursuant to adjournment.

Appearances: Same counsel as heretofore noted.

By Mr. Page: I wish to present the receipt of the State of Virginia for State taxes paid by the Merchants National Bank in the year 1915. This is a duplicate; the original cannot be found. I ask that it be filed as Exhibit "F"; said receipt being in the following words and figures:

Commonwealth of Virginia,

Office of the Auditor of Public Accounts.

Richmond, June 1, 1915.

Received of Merchants National Bank located at Richmond, Virginia, the receipt of the Treasurer of Virginia for Forty Six hundred and Twenty Two Dollars and 30 cents, on account of Taxes assessed on the shares of stock of the stockholders of said Bank for the support of the Government for the year 1915,

\$3,301.65

on account of Taxes assessed on the shares of stock of the stockholders of said Bank for the support of the Public Free Schools for the year 1915.....

1,320.65

Total\$4,622.30

(Signed)

JOHN T. SALE,

Acting Auditor of Public Accounts.

Check Register No. 10204.

Duplicate.

By Mr. Pollard: I agree that it may be admitted as a true copy of the original.

H. E. TRESNOR, the witness on the stand at the time of adjournment, resuming the stand, testified as follows:

By Mr. Pollard:

X Q. Mr. Tresnor, referring to the assessment of intangibles in general, did you mean to limit your statement to intangibles in the use and trading of which there would be competition with the banking associations?

By Mr. Pickrell: I object.

X Q. Was it chiefly of that character?

A. No, not all of it.

By Mr. Page:

Q. What part of it was of that character which competes with national banks, in your opinion?

By Mr. Pollard: I object.

By the Court: Objection overruled.

Q. You stated in answer to Mr. Pollard's question that all of the intangible property did not compete with national banks. I asked you what part of the entire amount of intangible property competes with national banks?

A. I cannot say.

Q. What part does not?

A. I cannot say that.

61 By Mr. Pickrell:

Q. For all you know, all of it may compete with national banks.

A. I could not say that.

By Mr. Pollard:

X Q. Please examine the paper now handed you, which appears to be a blank form prepared by the Auditor of Public Accounts, furnished to the Commissioner of Revenue as an assessment form for 1915 on the shares of stock of the stockholders of banks, and state whether or not that is the form in which the taxation of banks was entered in your office in favor of the State in 1915.

By Mr. Pickrell: Objected to.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. This form is the assessment form furnished by the Auditor of Public Accounts to make the assessment on the shares of stock in the different banks held by the individual stockholders and reported back to him, and also to furnish each bank with a copy of the same.

X Q. Was a copy of that furnished to the Merchants National Bank?

A. It was; a copy of the assessment.

X Q. Read the headings on that paper.

A. "Assessment. Bank, Banking Association, Trust or Security Company. Assessment for the year 1915 by the Commissioner of the Revenue, City of Richmond, Virginia, of the value of the share or shares of each stockholder in the City of Richmond, Virginia. Name of the Bank, Banking Association, Trust or Security Company (then follows the name of the bank). Name of the President (then follows his name). Name of Cashier (then follows name of the cashier of the bank). Name of Stockholder. Residence of Stockholder. Number of shares of stock owned or held or controlled by

each stockholder. Par value of each share of stock. Actual value of each share of stock estimated on Capital, Surplus and Undivided Profits after deducting assessed value of real estate of Bank, Trust or Security Company taxed in this State. Aggregate of actual value of the shares of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate of Bank, Trust or Security Company taxed in this State. Amount of all bonds, demands and claims owing to each stockholder as principal debtor not otherwise deducted from taxable property not including any money due on account of the purchase of non-taxable securities. Actual value of the shares of stock of each stockholder, after deducting amount of bonds, etc. (entered in the preceding column) from aggregate of actual value of shares of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate of Bank, Trust or Security Company, taxed in this State. Tax on aggregate actual value of shares of stock of each stockholder, after making the deductions allowed by law at twenty-five cents on the \$100 value for the support of the government. Tax on aggregate actual value of shares of stock of each stockholder, after making the deductions allowed by law at ten cents on \$100 value for the support of the public free schools. Total Tax assessed against each stockholder."

X Q. Now read the certificate at the bottom of it.

A. Actual value of shares estimated upon capital, surplus and undivided profits." Then follows the aggregate and the number of shares, less deductions on real estate.

X Q. Read the certificate.

A. "Given under my hand this — day of —, 1915, —, Commissioner of the Revenue."

X Q. That is what you certify to the Auditor?

A. Yes.

X Q. As having been taxed on shares of stock for State purposes?

A. Yes.

By Mr. Page: You file this paper?

By the Witness: Yes.

X Q. You certify that to the Auditor under your hand as Commissioner of the Revenue?

A. Yes.

X Q. Did you do that in this case?

A. Yes.

X Q. Did you also furnish the bank with a copy of it?

A. I did.

By Mr. Pollard: I call upon the bank to produce that paper that was filed with them of the assessment in 1915.

NOTE: Counsel for the petitioner produces the paper.

63 X Q. Please examine this paper and state whether or not that is a paper that you furnished to the bank.

A. Yes, that was furnished by the office to the Merchants National Bank.

X Q. See if you can identify it by the handwriting.

A. Yes, I know the party who wrote that.

X Q. Do you find on the last page some of your writing?

A. Yes.

X Q. Do you identify it, although not signed, as the paper that was furnished?

X Q. Did they act upon that and pay the taxes on that?

A. Yes.

X Q. What did you similarly do with the purpose of having the City taxes entered against the stockholders that were indebted on account of the City assessment? What, if anything, did you do?

A. I entered it on the personal property book. I put down the name of the bank, the values, and extended the taxes on the values of that bank at the \$1.40 rate.

By Mr. Pickrell: I object to the answer as the personal property book as already here in evidence and is the only evidence that is competent.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

X Q. And the paper that was introduced here when you were on examination in chief is the mode which you adopted to accomplish the end in view, namely: to make an assessment roll for the City taxes?

A. Assessment for the City taxes on the aggregate of the values.

X Q. Did you ever know of any objection made by the bank to that process?

A. No, sir.

X Q. Have they from year to year been paying the taxes on a similar arrangement and similar assessment?

A. Yes.

NOTE.—The blank form of assessment referred to is herewith filed as Exhibit "G"; the copy of the assessment furnished the Bank is herewith filed as Exhibit "H"; the two exhibits being in the following words and figures:

(Here follow pasters marked pages 65 and 66.)

EXHIBIT "G"

ASSESSMENT

(See Copy of Law on Back)

BANK, BANKING ASSOCIATION, TRUST OR SECURITY COMPANY

Assessment for the year 1915 by....., Commissioner of the Revenue, County (or City) of.....

P. O. Address....., of the value of the Share or Shares of each Stockholder in the.....

located at....., Virginia, in his district.

Name of the Bank, Banking Association, Trust or Security Company.....

Name of the President.....

Name of Cashier (or Treasurer).....

NAME OF STOCK- HOLDER	RESIDENCE OF STOCKHOLDER	Number of shares of stock owned or held or controlled by each stockholder.	Par value of each share of stock.	Actual value of each share of stock estimated on Capital, Surplus and Undivided Profits after deducting assessed value of real estate in this State.	Aggregate of actual value of the share of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after de- ducting assessed value of real estate of Bank, Trust or Security Company taxed in this State.	Amount of all bonds, demands and claims owing by each stockholder as principal debtor not otherwise deducted from his taxable property, not including any money due on account of the purchase of non-tax- able securities. (See Note I, below.)	Actual value of the shares of stock of each stockholder, after deducting amount of bonds etc. (entered in the preceding col- umns) from aggregate of actual value shares of Capital, Surplus and Undivided Profits, after deducting assessed value of real estate of Bank, Trust or Security Company taxed in this State.	Tax on aggregate actual value of shares of stock of each stockholder, after making the deductions allowed by law at twenty-five cents on the \$100 value for the support of the Government.	Tax on aggregate actual value of shares of stock of each stockholder, after making the deductions allowed by law, at ten cents on \$100 value for the support of the public free schools.	Total Tax assessed against each stockholder.
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Totals

ACTUAL VALUE OF SHARES ESTIMATED UPON CAPITAL, SURPLUS AND UNDIVIDED PROFITS
February 1st, 1913

Capital.....	\$	1913
Surplus.....		
Undivided Profits.....		
Aggregate.....	\$	
	\$	
Divide by number of all the shares to ascertain the value of each share.	No. of Shares,	

Given under my hand this..... day of..... 1913

Commissioner of the Revenue.

NOTE 1. The aggregate deductions on account of bonds, etc., owing by the stockholders shall not exceed ten per cent of the amount which remains after deducting the assessed value of real estate taxed in this State to the bank from the aggregate of Capital, Surplus and Undivided Profits.

NOTE 2. "From the total value of the shares of stock of any such bank, banking association, trust or security company, which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted the value of its real estate otherwise taxed in this State, or if the title to the building in which such bank, banking association, trust or security company does its business, and the land on which it stands, is held in the name of a separate corporation, in which such bank, banking association, trust or security company owns all or a majority of the stock, and such real estate be otherwise taxed in this State, then there shall be deducted from the value of the shares of stock of such bank such proportion of the assessed value of said real estate as the stock it owns in such holding corporation bears to the whole issue of stock in such corporation; and the actual value of each share of stock shall be its proportion of the remainder." (Sec. 17—Tax Laws.)

ASSESSMENT

(See Copy of Law on Back)

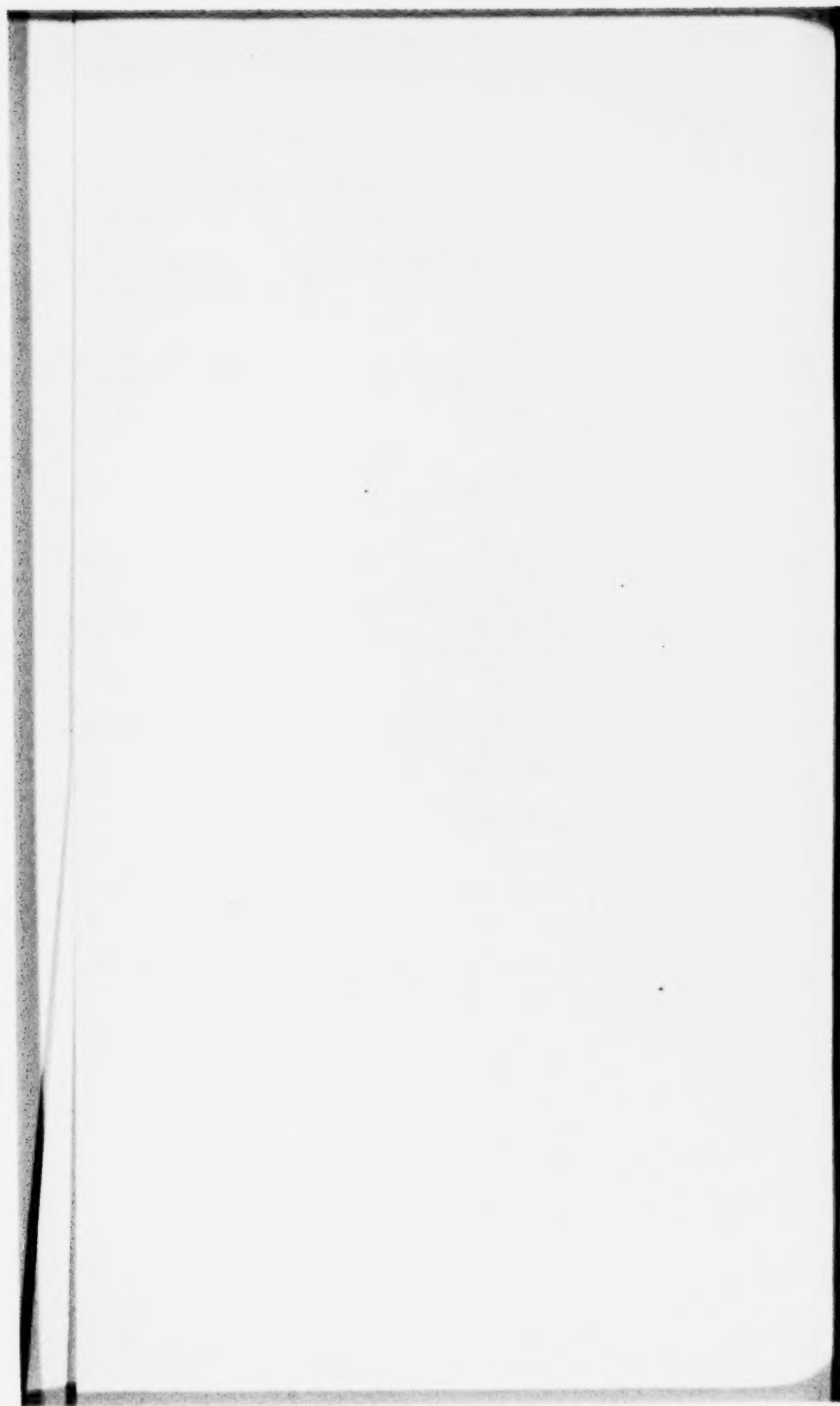
BANK, BANKING ASSOCIATION, TRUST OR SECURITY COMPANY

Assessment for the year 1915 by H. E. Treason, Commissioner of the Revenue, City of Richmond, Va., of the value of the Share or Shares of each Stockholder in the Merchants National Bank, located at Richmond, Va., in his district.

Name of the Bank, Banking Association, Trust or Security Company, Merchants National Bank.

Name of Cashier, Thos. B. McAdams

NAME OF STOCK- HOLDER	RESIDENCE OF STOCKHOLDER	Number of shares of stock owned or held or controlled by each stockholder.	Par value of each share of stock.	Actual value of each share of stock estimated on Capital, Surplus and Undivided Profits after deducting assessed value of real estate in this State.	Aggregate of actual value of the shares of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after de- ducting assessed value of real estate of Bank, Trust or Security Company taxed in this State.	Amount of all bonds, demands and claims owing by each stockholder as principal debtor not otherwise deducted from his taxable property, not including any money due on account of the purchase of non-tax- able securities. (See Note I, below.)	Actual value of the shares of stock of each stockholder, after deducting amount of bonds, etc. (entered in the preceding col- umn) from aggregate of actual value shares of stock of each stockholder, estimated on Capital, Surplus and Undivided Profits, after deducting assessed value of real estate of Bank, Trust or Security Company taxed in this State.	Tax on aggregate actual value of shares of stock of each stockholder, after making the deductions allowed by law at twenty-five cents on the \$100 value for the support of the government.	State Tax	City Tax	Total Tax assessed against each stockholder.
Branch, Jno. P.	Richmond, Va.	774	100	515,477 81	515,477 81				1,804 17	7,216 68	
" Thos. & Co.	"	265		176,467 88	176,467 88				617 71	2,470 84	
" Jno. Akin.	"	10		6,679 92	6,679 92				23 31	93 24	
" Mrs. B. G.	Pawling N. Y.	80		83,279 36	83,279 36				186 48	745 92	
" Jno. Kerr.	Richmond, Va.	11		7,325 91	7,325 91				25 64	102 56	
" Miss E. K.	Paris, France.	11		7,325 91	7,325 91				25 64	102 56	
" Blythe W.	Pawling, N. Y.	41		27,305 67	27,305 67				95 57	382 25	
" Miss L.	Richmond, Va.	1		665 90	665 90				2 33	9 32	
" M. C.	Richmond, Va.	14		9,323 89	9,323 89				32 63	130 52	
Rogert, Mrs. H. C.	Cartersville, Va.	10		6,679 92	6,679 92				23 31	93 24	
Boykin, Mrs. E. B.	Richmond, Va.	11		7,325 91	7,325 91				25 63	102 52	
" Anna B.	"	17		11,321 86	11,321 86				39 62	154 48	
" Ellen P.	"	17		11,321 86	11,321 86				39 63	156 52	
" H. G.	"	17		11,321 86	11,321 86				39 62	154 48	
Buford, Mrs. M. C.	"	6		3,695 95	3,695 95				13 99	55 96	
Caskie, James.	"	10		6,679 92	6,679 92				23 31	93 24	
Crouch, Mrs. M. A.	"	60		39,079 52	39,079 52				139 86	559 44	
Campbell, Mrs. M. S.	"	35		23,369 72	23,369 72				81 56	326 32	
Campbell, Mrs. M. A.	"	8		5,327 94	5,327 94				18 65	74 60	
Dance, Mrs. Ellen J.	"	2		1,331 98	1,331 98				4 66	18 64	
Dooley, Jas. H.	"	20		13,319 84	13,319 84				49 62	198 43	
George, Dr. A. S.	"	51		33,985 59	33,985 59				118 88	475 52	
Garrett, Lottie C.	William abnrg. Va.	8		5,327 94	5,327 94				18 65	74 60	



64 Redirect examination.

By Mr. Page:

Q. You are required by law, are you not, Mr. Tresnon, to make a record of the assessment in your office? Did you comply with the law in keeping the assessment of personal property in your office as required by law?

A. Yes.

Q. That is kept in the personal property books, is it not?

A. Personal property books on personal property, yes, but not the banks.

Q. You kept no copy of this assessment in your office where you taxed the banks for City taxes for 1915, did you?

A. I kept a combination copy.

Q. What do you mean by that?

A. I have the values for City purposes and the values for State purposes—City taxes and State taxes—in a summary sheet.

Q. As exhibited on the personal property book?

A. Yes.

By Mr. Pickrell:

Q. Do you mean to say you extend Exhibit "II" upon your personal property book?

A. No, I said I kept a summary.

Q. What do you call the summary—what you read to the court this morning?

A. Yes.

Q. Read it over again.

A. This is a summary that I kept.

Q. Read what you read as to the Merchants National Bank.

A. For City purposes or for State purposes, or for both?

Q. Just read both.

A. "Merchants National Bank; number of shares, 2,000; par value of each share, \$100; actual value after deducting real estate, \$665,992.

Q. Was that in your personal property book when you brought it in here this morning?

A. No, just the total value, \$1,320,662.11.

By Mr. Pickrell: I move that his answer be rejected as being illegal.

Q. What is on the personal property book?

67 A. Value, \$1,320,662.11; taxes, \$18,489.20.

Q. That is all that is on the personal property book?

A. Yes.

Q. You said the personal property book contained a summary. Does it contain any reference to the stockholders?

A. No, sir.

Q. The only thing it contains is the name of the bank, which is put in the place where appears the name of the person assessed with

personal property, then the amount with which it is assessed, then the taxes on that amount. That is all that appears upon the official record known as the personal property book?

A. Yes, sir.

Q. Now as to loose papers you keep in your office, which have just been referred to as Exhibit "H", there is no reference to them in this official record?

A. No, sir.

Q. And no summary of them?

A. No, sir.

Q. No reference to shares of stock?

A. No, sir.

Q. It is a plain assessment against the bank upon a particular amount, with the tax set opposite, is it not?

A. Yes, sir.

Q. That refers to both State and City?

A. That is for the City. For the State we have the original report of the bank on file in the office.

Q. Don't you enter that on the personal property book?

A. No, sir.

Q. And that is true about the City?

A. Yes, sir.

By Mr. Wall:

Q. A good deal has been said about the tax rate that you imposed on intangible personal property for the year 1915. Was there any intangible property or any money capital in the hands of individuals residing in the City of Richmond, other than the capital, surplus and undivided profits of banks and banking institutions, on which you assessed a tax of \$1.40 on the \$100?

A. In 1915?

Q. Yes. Was there any money capital in the hands of individuals that you assessed?

A. There was capital employed in the City of Richmond that we taxed at \$1.40. That was merchants' capital.

68 Q. I mean capital that was used as money. Of course, capital used in the mercantile business is not capital that is used as money. Was there any other money capital that you imposed a \$1.40 tax on?

A. No, sir.

Q. Was there any other money capital in the hands of individuals residing in the City of Richmond that you assessed with a tax of more than 30c. on the \$100 for 1915?

A. It is hard to answer a question of that kind because there was a \$1.40 rate on certain capital which the State did not tax at all.

Q. What kind of capital was that?

A. Other capital was taxed at \$1.40.

Q. Was there anybody except merchants and banks that you taxed at \$1.40?

A. No other capital.

Witness stood aside.

THOS. B. McADAMS, a witness of lawful age, introduced on behalf of the petitioner, being first duly sworn, testified as follows:

Direct examination.

By Mr. Page:

Q. Will you kindly state your residence and occupation?

A. Richmond, Va.; Vice-President of the Merchants National Bank.

Q. How long have you been connected with the Merchants National Bank?

A. In an official capacity?

Q. Yes, in any capacity.

A. I have been an officer of the bank thirteen years.

Q. What office do you now occupy?

A. Vice-President.

Q. Will you kindly state whether or not money capital in the hands of individuals invested in bonds, notes and other evidences of debt comes in competition with national banks.

A. Yes.

Q. Will you kindly explain how this is so.

By Mr. Pollard: I object.

By the Court: Objection overruled.

By Mr. Pollard: Exception.

69 A. Our assets are invested in bonds, notes and other evidences of debt. The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate that a bank can get on a similar investment. In other words, the greater the competition, the lower the rate; the greater the demand, the higher the rate.

Q. Do the national banks lend money on notes secured by real estate?

A. You are speaking now with reference to 1915?

Q. Yes.

A. Yes, they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds.

Q. Do you know how much money there was in the hands of individuals in the City of Richmond invested in bonds, notes and other evidences of debt?

By Mr. Pollard: I object.

A. No.

Witness stood aside.

By Mr. Pickrell: I think it is proper now to put the question to Mr. Tresnon as to the aggregate bonds, notes and other evidences of debt because of the fact that Mr. McAdams has testified that such does come in competition with national banks.

By the Court: The question is too general. I suppose it will be conceded that part of it would be in competition with national banks but the question applied to all and I reserved to you the right to show by testimony that any portion of it might come in competition with national banks and that is still open to you if you can do that; but to illustrate, as I stated this morning and I think all will admit it, if I sell a house for \$20,000 and take notes for the deferred \$15,000 and keep them in my pocket until they mature, it will not necessarily come in competition with national banks, but still at the same time they would be intangibles that could be taxed. Now if
70 you can segregate and tell what portion of these intangible assets will come in competition with national banks, the way is open to you. I overrule the motion.

H. E. TRESNON, Commissioner of Revenue, being subsequently recalled, with permission of the Court, testified as follows:

That the notes, bonds and other evidences of indebtedness returned and assessed for taxation for the year 1915 amounted to \$6,250,252; that municipal bonds returned and assessed for taxation for the year 1915 amounted to \$981,040.00.

That real estate agents who negotiate loans on real estate are required by the State law to take out licenses as private bankers. There were forty-five such real estate agents who took out licenses as private bankers in the year 1915.

D. C. RICHARDSON, [SEAL.]
Judge.

MERCHANTS NATIONAL BANK OF RICHMOND

vs.

CITY OF RICHMOND.

City's Bill of Exceptions No. 3.

Be it remembered that at the trial of this case, and after all of the evidence had been heard, introduced on behalf of the plaintiff and of the defendant, which evidence is made a part of the defendant's bill of exception No. 2, to which reference is made as if the same were fully repeated herein, and after the court had entered the order of August 3, 1917, the defendant moved the court to set aside said order and grant it a new trial on the ground that the same is contrary to the law and evidence in the case, but the court overruled said motion and refused to set aside said order, to which action of the court the defendant excepted and now files this, its bill of exceptions No. 3, which it prays may be signed, sealed, enrolled and made a part of the record, which is accordingly done this 3d day of October, 1917.

D. C. RICHARDSON, [SEAL.]
Judge.

1 STATE OF VIRGINIA,
City of Richmond, To wit:

I, Walter Christian, Clerk of the Hustings Court of the City of Richmond, to correct an alleged erroneous assessment for the year 1915, from the Record in this case was duly given by Page & Leary, Coke Pickrell, Attorneys for the *Petitioner*, the Merchants National Bank of Richmond.

Given under my hand this 3rd day of October, 1917.

WALTER CHRISTIAN,
Clerk of the Hustings Court of the City of Richmond.

2 Hustings Court of City of Richmond.

CITY OF RICHMOND

v.

MERCHANTS NATIONAL BANK OF RICHMOND.

Opinion by Judge Stafford G. Whittle, President.

Richmond, Va., March 13, 1919.

This case originated in the Hustings court with a petition by the Merchants National Bank of Richmond against the city of Richmond, to correct an alleged erroneous assessment for the year 1915, directly against the bank upon its capital stock, surplus and undivided profits, less the assessed value of its real estate and other deductions allowed by law, instead of being levied and assessed against the shareholders of the stock of the bank upon the value of their shares ascertained as the law prescribes. Moreover, complaint was made that the assessment instead of being limited to the alleged maximum rate of thirty cents on each \$100 of the ascertained value of the shares of stock, was fixed, levied and collected at \$1.40 on each \$100 of such value. To an order of the Hustings court granting the relief prayed for, this writ of error was allowed.

Two assignments of error were pressed. 1. That the court erred in overruling the motion of the city to dismiss the proceeding for want of jurisdiction. 2. In establishing thirty cents on the \$100 of value as the maximum rate that could be levied on the city on the shares of bank stock in place of \$1.40.

The first assignment rests upon the contention that the assessment, in essence, is against the stockholders and therefore, the proceeding should have been in their name and could not be maintained by the bank. *Main St. Bank, Inc. v. City of Richmond*, 22 Va. 15 Va. App. 481.

Whatever merit there may have been in this assignment in the first instance, the error in procedure was cured by the consent order, *in pro tunc*, whereby the amount of taxes ascertained to be due from the shareholders was assessed against them. The court, by

virtue of the consent order, was within its powers thus to admit the shareholders (the real persons in interest) as parties, and to make a correct assessment against them. *Commonwealth v. Schmelz*, 114 Va. 364, 7 Va. App. 395.

2. The remaining controverted question for our determination is, what was the maximum rate which the city of Richmond could lawfully levy on the shares of bank stock for the year 1915?

By way of premise to the consideration of this feature of 74 the case, we may observe, that the city of Richmond, under its charter possesses plenary power of taxation, subject only to such limitations as may be placed upon the exercise of that power by the Constitution and legislature.

The ordinance approved April 9, 1915, is founded upon the city charter and the segregation act passed by the general assembly at its extra session of 1915, and approved March 15, 1915, (an emergency was declared to exist with respect to it, so that the act was in force from its passage). Acts 1915, Ch. 85, p. 119. The gravamen of the bank's complaint is that its capital is taxed at the rate of \$1.40 on the \$100, instead of thirty cents, the rate imposed on other moneyed capital in the hands of individuals. Its contentions are based on an alleged conflict between the ordinance and section 1040-a of the Code; section 168 of the State Constitution; the fact that at the date of the assessment the rate of taxation on all intangible property taxed that was also taxed by the State was at the rate of thirty cents on the \$100; and that a higher rate than thirty cents contravened section 5319, Rev. Stat. of the U. S. All of these objections 75 except the last were practically disposed of by the construction placed upon the segregation act by the decision of this court in the case of *City of Richmond v. Drewry-Hughes Co.*, 122 Va., 15 Va. App. 161, 94 S. E. 989.

The history of the litigation of which that case is the sequel was this: By authority of the ordinance (one of the features of which is here drawn in question) the city assessed the capital employed by Drewry-Hughes Co. (and other merchants residing and doing business in the city) in their business as merchants at \$1.40 on the \$100. From an order of the Hustings court declaring the correct rate of taxation in that case to be 30 cents on the \$100, the city appealed, and at the November term, 1916, of this court that judgment was affirmed. The case again came before us on rehearing; and was ably argued by the original counsel, and also by others, whose localities were affected by the decision, on briefs; and in an exhaustive opinion, written by Judge Kelly and concurred in by all the other judges, the judgment of the Hustings court was reversed. The last opinion covers the contentions stressed in this case, save the insistence that the exception in the segregation act as thereon construed would, if applied to national banks, be violative of section 5219, *supra*.

Since, therefore, we have no purpose to recede from the conclusions reached in the merchants' tax case, further elaboration 76 of the questions settled by that decision is unnecessary. This statement is predicated upon the view that the exceptions in

the act of 1915, in respect to the capital of merchants and the shares of stock of banks in the particular here involved are so concatenated as necessarily to demand the same construction.

The act after segregating the several kinds and classes of property, so as to specify upon what subjects State taxes and upon what subjects local taxes may be levied, respectively, and limiting the maximum local rate of taxation on segregated intangible personal property at thirty cents on the \$100 of assessed value thereof, contains the following exception: "except that the capital of merchants shall not be subject to the State taxation, but may be taxed locally as prescribed by law; and the shares of stock of banks, banking associations, and other institutions enumerated in section seventeen in Schedule 'D' of the act aforesaid, which shares of stock shall be taxed as provided by law."

Judge Kelly, in his opinion, justly observes: "If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named in that particular act, undoubtedly he would have used the words, 'as prescribed by this act', or their equivalent, instead of 'as prescribed by law'."

If this be not true, then it would follow that 'shares of stock of banks' could only be taxed locally at the 29-cent rate, for, as we have seen, it cannot be plausibly contended that the words, 'as prescribed by law', when applied in the act to merchants' capital, have any other or different meaning than the words 'as provided by law' then applied therein to bank stock. The necessary result of the decision of this court in *Tresnon v. Board of Supervisors*, 90 S. E. 615 (120 Va. 203, 13 Va. App. 172), is that the local taxation of bank stock is not controlled by the terms of the segregation act."

Judge Kelly also points out that section 168 of the Constitution does not conflict with the right of the taxing power to tax different classes of intangible personal property at different rates. Citing *Judson on Taxation*, sec. 441; 37 Cyc. 746; *Bradley v. City of Richmond*, 110 Va. 521, 524, 3 Va. App. 877.

Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States, in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other "moneyed capital in the hands of individual citizens of the State:" Obviously the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

In 9 U. S. Comp Stat. (1916), title "National Banks," at p. 11,993, note 29, it is said: "Moneyed capital.—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase 'moneyed capital' used therein means capital engaged in the operations of banking, which is used as a source of profit, so that Act N. Y., July 1, 1882, s. 312, declaring that the stockholders in banks organized under the authority of the State or United States shall be assessed for the value of their stock, was not

void under this section, because the assessment roll showed that the securities of life insurance companies, the stock of State corporations, the deposits of savings banks, the stock of trust companies, and companies created outside of the State and owned in the State, virtually escaped taxation, since such property, excepting that of savings banks and trust companies, was not 'moneyed capital in the hands of individuals' as contemplated by this section." *Merchantile Nat. Bank v. New York*, (1887), 121 U. S. 138, 30 L. Ed. 895; *National Bank, etc. v. Boston*, (1888) 125 U. S. 60, 31 L. Ed. 689; *Palmer v. McMahon* (1890), 133 U. S. 660, 33 L. Ed. 772; *Talbott v. Board of Commissioners, etc.*, (1894) 139 U. S. 438, 35 L. Ed. 210; *First Nat. Bank v. County of Chehalis* (1897), 166 U. S. 440; *New York, ex rel. Amoskeag Sav. Bank v. Purdy* (1913), 231 U. S. 373 58 L. Ed. 373.

These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of defendant in error, that the rate of tax imposed under the segregation act and the ordinance of the city upon the shareholders of bank stock constitute "a gross and illegal discrimination against that species of property as compared with all other moneyed capital," is groundless.

In conclusion, it is only fair to the learned judge of the hustings court to state, that on August 3, 1917, when he delivered his judgment in this case fixing the maximum amount of tax against shareholders of bank stock at thirty cents on the \$100, the first decision of this court in *City of Richmond v. Drewry-Hughes Co.* was still in force, and he naturally regarded it as strongly persuasive if not controlling authority in the instant case.

For the reasons given, the order complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with the views expressed in this opinion.

Reversed.

81 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Thursday, the 13th day of March 1919.

CITY OF RICHMOND, Plaintiff in Error,
against

MERCHANT'S NATIONAL BANK OF RICHMOND, VA., Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by The Hustings Court of the City of Richmond on the 3rd day of August, 1917.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment

aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous.

It is therefore considered that the same be reversed and annulled, and the cause is remanded to the said Hustings Court for further proceedings to be had *therewith* in conformity with the views expressed in the said written opinion of this Court.

It is further considered that the plaintiff in error recover of the defendant in error its costs by it expended about the prosecution of its writ of error and supersedeas aforesaid here.

Which is ordered to be certified to the said Hustings Court.

A copy.

Teste:

H. STEWART JONES,
C. C.

82 *Plaintiff in Error's Costs.*

Attorney's fee	\$20.00
Writ tax, etc.....	6.50
Printing	128.50
Transcript	23.40
Clerk's fees	2.59
	<hr/>
	\$180.99

Teste:

H. STEWART JONES,
C. C.

A copy.

Teste:

WALTER CHRISTIAN,
Clerk.

VIRGINIA:

In the Hustings Court of the City of Richmond. April 19th, 1919.

MERCHANTS NATIONAL BANK OF RICHMOND

VS.

CITY OF RICHMOND.

Final Order.

This day came the parties by their attorneys and it appearing to the court from a mandate certified to this court by the Supreme Court of Appeals of Virginia that the order of this court entered herein on August 3, 1917, has been reversed and annulled by an order of the Supreme Court of Appeals of Virginia entered on the

13th day of March 1919, which last mentioned order has been duly recorded in the Order Book of this Court.

83 It is now ordered that the said judgment and order of August 3, 1917, in obedience to the said order of the Supreme Court of Appeals of Virginia be set aside and annulled, and the court being of opinion that nothing further remains to be done in these proceedings it is ordered that the application of the plaintiff be rejected and the correction of the alleged erroneous assessment in the petition complained of be refused, and these proceedings be dismissed, and that the defendant recover of the plaintiff its costs about its defense in this behalf expended.

A copy.

Teste:

WALTER CHRISTIAN,

Clerk.

A Transcript from the Record.

Teste:

WALTER CHRISTIAN,

*Clerk of the Hustings Court
of the City of Richmond, Va.*

Cost of this Transcript, \$23.40.

84 VIRGINIA:

In the Supreme Court of Appeals, Held at the Library Building, in the City of Richmond, on Tuesday, the 25th Day of November, 1919.

The petition of the Merchants National Bank of the City of Richmond for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 19th day of April, 1919, by which the application of the plaintiff for the correction of an erroneous and improper assessment of taxes assessed against it by the City of Richmond upon its capital, surplus and undivided profits for the year 1915, was denied and its petition dismissed, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Hustings Court.

A Copy.

Teste.

H. STEWART JONES,

C. C.

Authentication of Record.

Supreme Court of Appeals of the State of Virginia.

I, H. Stewart Jones, Clerk of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the writings annexed to this certificate are true copies of the originals on file and of record in my office in the case of Merchants National Bank of Richmond, Virginia, against the City of Richmond, and that said originals, together, constitute the record of the proceeding of this court in said cause.

Witness my hand and seal of the said court, this the 12th day of December, 1919.

H. STEWART JONES,
Clerk.

I, Stafford G. Whittle, President and one of the Judges of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of the said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 12th day of December, 1919.

STAFFORD G. WHITTLE. [SEAL.]
President.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable Stafford G. Whittle, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and seal of said court this the 12th day of December, 1919.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk.

86 Supreme Court of Appeals of the State of Virginia.

MERCHANTS' NATIONAL BANK OF RICHMOND, VIRGINIA, Com-
plainant,

v.

CITY OF RICHMOND, VIRGINIA, Defendant.

Petition for a Writ of Error.

Considering itself aggrieved by the final decision and judgment of the Supreme Court of Appeals of the State of Virginia in refusing a writ of error to the final judgment and order of the Hustings Court of the City of Richmond, in the above entitled proceedings, and also considering itself aggrieved by the final order and judgment of the Hustings Court of the City of Richmond in the said proceedings, the Merchants' National Bank of Richmond, Virginia, hereby prays a writ of error from the said decision and judgment of the Supreme Court of Appeals of Virginia, and from the said judgment and order of the Hustings Court of the City of Richmond, to the Supreme Court of the United States. Assignments of error are filed herewith.

E. WARREN WALL,
LEGH R. PAGE,
Counsel for Complainant.

STATE OF VIRGINIA,
Supreme Court of Appeals:

Let the writ of *this* error issue upon the execution of a bond by the Merchants' National Bank of Richmond, Virginia, to the
87 City of Richmond, Virginia in the sum of \$500.00, said bond, when approved, to act as a supersedeas to the decision and judgment of the Supreme Court of Appeals aforesaid, and to the judgment and order of the Hustings Court of the City of Richmond aforesaid.

Dated this 30th day of December, 1919.

STAFFORD G. WHITTLE,
*President of the Supreme Court of Appeals
of the State of Virginia.*

In the Supreme Court of Appeals of the State of Virginia.

MERCHANTS NATIONAL BANK OF RICHMOND, VIRGINIA, Plaintiff,

v.

THE CITY OF RICHMOND, VIRGINIA, Defendant.

Assignments of Error.

Now comes the complainant in the above entitled cause and files the following assignments of error upon which it will rely in its prosecution of its writ of error in the above entitled cause from the judgment or order made by the Supreme Court of Appeals of Virginia, on the twenty-fifth day of November, 1919.

First.

The Supreme Court of Appeals of Virginia and the Hustings Court of the City of Richmond erred in holding that the tax complained of, which was imposed by the defendant upon the plaintiff's capital, surplus and undivided profits was not repugnant to the constitution and laws of the United States of America, and particularly to Section 5219 United States Revised Statutes.

Second.

That the Supreme Court of Appeals of Virginia, and the Hustings Court of the City of Richmond, erred in holding that the ordinance adopted by the council of the City of Richmond on April 9th, 1915 imposing a tax at the rate of one and four tenths per centum upon the capital, surplus and undivided profits of the plaintiff, a National banking association was a valid exercise of the defendant's taxing power, and was not a repugnant to the constitution and laws of the United States of America, and particularly to section 5219 United States Revised Statutes.

Third.

That the Supreme Court of Appeals of Virginia, and the Hustings Court of the City of Richmond, erred in holding that Sec. 1040 A. of the Code of Virginia as construed by the Supreme Court of Appeals of Virginia to authorize the City of Richmond to impose a tax upon the plaintiff's capital, surplus, and undivided profits at a higher rate than the city imposed upon other moneyed capital in the hands of individual citizens of the said city, was not repugnant to the constitution and laws of the United States of America, and particularly to Section 5219 United States Revised Statutes.

Fourth.

That the Supreme Court of Appeals of Virginia, and the Hustings Court of the City of Richmond erred in the holding that the ordinance of the City of Richmond approved April 9th, 1915, when read and taken in connection with Sec. 1040 A. of the Code of Virginia, and Chapter 85 of the Acts of Assembly of Virginia 1915, p. 119 and sections 17, 18, 19, 20, 21, and 22 of the tax bill of the State of Virginia, as constructed by the Supreme Court of Appeals of Virginia, the effect of which was to impose upon the plaintiff's stock a tax for State purposes of $35/100$ of one per centum and to impose a tax for City purposes upon the plaintiff's capital, surplus, and undivided profits of 1 and $4/10$ per centum, while upon all other moneyed capital in the hands of individual citizens of the said City and State there was imposed a combined State and local tax of $95/100$ of 1 per centum; was not repugnant to the constitution and laws of the United States of America, and particularly to Section 5219 United States Revised Statutes.

Fifth.

That the Supreme Court of Appeals of Virginia, and the Hustings Court of the City of Richmond, erred in holding that the tax which was levied, assessed and collected by the City of Richmond for the year 1915 under its Ordinance approved on the 9th., day of April of that year at the rate of one and four tenths per centum upon the capital, surplus and undivided profits of the plaintiff, when the tax levied, assessed and collected by said City of Richmond for the same year under the same ordinance upon other competing moneyed capital in the hands of individuals was at the rate of only three-tenths of one per centum, was not a discrimination against the capital, surplus, and undivided profits of said plaintiff in favor of such other competing moneyed capital contrary to the constitution and laws of the United States of America and especially to Section 5219 of the United States Revised Statutes.

Sixth.

That the Supreme Court of Appeals of Virginia and the Hustings Court of the city of Richmond, erred in the holding that the tax which was levied, assessed and collected by the City of Richmond for the year 1915 under its Ordinance approved on the 9th., day of April of that year at the rate of one and four-tenths per centum upon the capital, surplus, and undivided profits of the plaintiff, taken in connection with the tax which was levied, assessed and collected by the Commonwealth of Virginia at the rate of three and one-half tenths per centum upon the actual volume of the shares of stock of the plaintiff, making a total State and City Tax of one and seven and one-half tenths per cent on the actual value of the stock, and on the capital, surplus and undivided profits of the plain-

tiff, when the tax levied, assessed and collected by the said City of Richmond for the same year under the said Ordinance upon other competing moneyed capital in the hands of individuals was at the rate of three tenths of one per centum, and which tax, taken in connection with the tax imposed by the State of Virginia at the rate of six and one-half tenths of one per centum upon such other competing capital in the hands of individuals, made a total State and City tax of nine and one half tenths per centum, which was all the taxes imposed under the authority of the said State upon such other competing moneyed capital in the hands of individuals, was not a discrimination against the said plaintiff, its capital, surplus and undivided profits and its shares of stock, and in favor of such other competing moneyed capital in the hands of individuals contrary to the constitution and laws of the United States of America and especially to section 5219 of the Revised Statutes of the United States.

Seventh.

That the Supreme Court of Appeals of Virginia, and the Hustings Court of the City of Richmond, erred in holding that the said City of Richmond was authorized by the laws of the State of Virginia to impose upon the shares of stock of the said plaintiff a tax at the rate of \$1.40 on the hundred dollars of the actual value thereof, when for the same year the said City by its said Ordinance imposed upon other competing moneyed capital in the hands of individuals a tax at the rate of 30¢ on the one hundred dollars, and that such tax, levied, assessed and collected as aforesaid upon the shares of stock of the plaintiff was not a discrimination against the shares of stock of the plaintiff in favor of such other competing moneyed capital in the hands of individuals, contrary to section 5219 of the Revised Statutes of the United States of America.

Eighth.

That the Supreme Court of Appeals of Virginia and the Hustings Court of the City of Richmond, erred in holding that the said City of Richmond was authorized by the laws of the State of Virginia to impose upon the shares of stock of the said Plaintiff a tax at the rate of \$1.40 on the hundred dollars of the actual value thereof, which tax taken in connection with the tax which was levied, assessed and collected by the Commonwealth of Virginia, for the said year at the rate of 35¢ on the hundred dollars of the actual value of such shares of stock made a total State and City tax of \$1.75 on the hundred dollars of the actual value of the said stock; when the tax levied, assessed and collected by the said City of Richmond for the same year, under the said ordinance upon other competing moneyed capital in the hands of individuals in the said City was at the rate of 30¢ on the hundred dollars of the actual value of such other competing moneyed capital in the hands of individuals, and which tax taken in connection with the tax imposed by the said State of Virginia for the said year upon such other competing moneyed capital in the hands of

individuals at the rate of 65¢ on the hundred dollars made a total State and City tax of 95¢ on each one hundred dollars of the actual value of such other competing moneyed capital in the hands of individuals, which was all the taxes imposed upon the authority of the said State upon such other competing moneyed capital in the hands of individuals, and in holding that the said tax was not a discrimination against the shares of stock of the plaintiff and in favor of such other competing moneyed capital in the hands of individuals, contrary to Section 5219 of the Revised Statutes of the United States of America.

92

Copy.

MERCHANTS NATIONAL BANK OF RICHMOND, Plaintiff,

v.

CITY OF RICHMOND, VIRGINIA, Defendant.

Bond.

Know all men by these presents that we, the Merchants National Bank, as principal, and the National Surety Company, as surety, are held and firmly bound unto the City of Richmond, Virginia, in the sum of \$500.00 to be paid to the said City of Richmond, Virginia, to which payment, well and truly to be made, we bind ourselves jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of December, 1919.

Whereas, the above named Merchants National Bank seeks to prosecute its writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled proceedings by the Hustings Court of the City of Richmond, Virginia, which judgment was affirmed by the Supreme Court of Appeals of the State of Virginia to grant a writ of error thereto or an appeal therefrom,

Now, therefore, the condition of this obligation is such that if the above named Merchants National Bank shall prosecute its said writ of error to the effect and answer all costs and damages that may attach, if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and virtue.

[Seal of Merchants National Bank.]

(Signed)

MERCHANTS NATL. BK., RICHMOND, VA.,

By JNO. M. WHITE, *Cashier*.

[Seal of National Security Co.]

(Signed)

NATIONAL SECURITY CO.,

By L. HEMIANT BURTON,

Atty in Fact.

Attest:

(Signed) H. S. WHITMORE.

93 I, Walter Christian, Clerk of the Hustings Court of the City of Richmond, do hereby certify that the above bond was duly executed in my office by the said Merchants National Bank, as principal, and by the National Surety Company, as surety, by me, its duly authorized agent and attorney in fact.

(Signed) **WALTER CHRISTIAN,**
Clerk of the Hustings Court of the City of Richmond.

This bond is approved.

(Signed) **STAFFORD G. WHITTLE,**
*President of the Supreme Court of Appeals
of the State of Virginia.*

The original of the foregoing supersedeas bond was lodged with the clerk of the Supreme Court of Appeals of Virginia on December 30, 1919, and the following endorsement made thereon. Bond filed December 30, 1919.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

94 UNITED STATES OF AMERICA, ss.:

The President of the United States to the Supreme Court of Appeals of Virginia:

Because in the record and proceedings, as also in the rendition of the judgment in the proceedings, which is in the said Supreme Court of Appeals of Virginia, before you, on application for a writ of error to the judgment and order of the Hustings Court of the City of Richmond, at the November term, 1919, thereof, in certain proceedings wherein the Merchant's National Bank of Richmond was plaintiff and the City of Richmond, Virginia was defendant, a manifest error has happened, to the great damage of the said Merchant's National Bank of Richmond Virginia, to which *the* judgment and order the Supreme Court of Appeals of Virginia subsequently, to-wit, on the 25th, day of November, 1919, refused a writ of error, thereby affirming said judgment of said Hustings Court of the City of Richmond, Virginia.

We being willing that error, if any has been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before sixty days from the date hereof, to the end that the record and proceedings aforesaid be inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and

according to the law and customs of the United States, should be done.

95 Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 30th day of December, 1919. Done in the City of Richmond, with the seal of the District Court of the United States for the Eastern District of Virginia, attached.

[Seal United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,

*Clerk of the United States District Court
for the Eastern District of Virginia.*

Allowed.

STAFFORD G. WHITTLE,

*President of the Supreme Court
of Appeals of Virginia.*

The original of the foregoing writ of error was lodged with the Clerk of the Supreme Court of Appeals of Virginia 30th day of December 1919.

H. STEWART JONES,

Clerk Supreme Court of Appeals of Virginia.

96 UNITED STATES OF AMERICA, ss:

The President of the United States to the City of Richmond, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of Virginia, wherein the Merchant's National Bank of Richmond, Va. is plaintiff in error and you are the defendant in error, to show cause if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done the party in that behalf.

Witness the President of the Supreme Court of Appeals of the State of Virginia, this 30th day of December 1919.

STAFFORD G. WHITTLE,

*President of the Supreme Court of Appeals
of the State of Virginia.*

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:

H. STEWART JONES,

*Clerk Supreme Court of Appeals
of the State of Va.*

I, H. R. Pollard, Attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

H. R. POLLARD,
City Attorney, Attorney for the
City of Richmond.

Endorsed on cover: File No. 27,465. Virginia Supreme Court of Appeals. Term No. 710. The Merchants' National Bank of Richmond, Virginia, plaintiff in error, vs. The City of Richmond. Filed February 6th, 1920. File No. 27,465.



No. 710, October Term, 1919.

THE MERCHANTS NATIONAL BANK OF RICHMOND, VIRGINIA,
Plaintiff in Error.

v.

THE CITY OF RICHMOND, VIRGINIA, Defendant in Error.

In Error to the Supreme Court of Appeals of the State of Virginia.

Stipulation and Agreement of Counsel.

It is hereby stipulated and agreed between H. R. Pollard, City Attorney and attorney of record for the City of Richmond, and E. Warren Wall and Legh R. Page, attorneys of record for the Merchants National Bank of Richmond, Virginia, that the petition of the City of Richmond in this case to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to a judgment in this case entered by the Hustings Court of the City of Richmond on the 1st day of August, 1917, which was inadvertently omitted from the transcript of the record in this case from the Supreme Court of Appeals of Virginia, a copy of which petition is attached hereto, consisting of printed pages numbered consecutively 1 to 53, inclusive, which are hereby identified and made a part of this stipulation and agreement, be printed under the supervision of the Clerk of the Supreme Court of the United States, in the same manner as the said petition would have been printed had it not been inadvertently omitted from the transcript of the record aforesaid.

And it is stipulated and agreed that a printed copy of the said petition, when so printed by the Clerk of the Supreme Court of the United States, be inserted in or attached to each of the copies of the record in the said case now filed in the office of the Clerk of the Supreme Court of the United States, and a copy be furnished to each person to whom a copy of the said record was furnished. The said printing and attaching or insertion is to have the same force and effect in every way as if a copy of the said petition had been filed with the remainder of the said record in the office of the Clerk of the Supreme Court of the United States, February 6, 1920, and had been printed as a part of the said record.

H. R. POLLARD,

*City Attorney and Attorney of Record
for the City of Richmond, Virginia.*

E. WARREN WALL,

LEGH R. PAGE,

*Attorneys of Record for the Merchants
National Bank of Richmond, Virginia.*

In the Supreme Court of Appeals of Virginia, at Richmond.

CITY OF RICHMOND, Plaintiff in Error,

vs.

MERCHANTS NATIONAL BANK OF RICHMOND, Defendant in Error.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

The petition of the City of Richmond, a municipal corporation created by and existing under the Constitution and statutes of this State, respectfully represents that it is aggrieved by a judgment of the Hustings Court of the City of Richmond, Virginia, entered against it on the 3rd day of August, 1917. A transcript of the record of the proceedings in the said case is herewith presented to be read a part of this petition. Your petitioner sets forth the following as the

Statement of the Case.

That on the 5th day of February, 1917, the defendant in error after having first notified you petitioner and H. E. Tresnon, Commissioner of the Revenue for the City of Richmond, filed a petition in said Hustings Court praying the correction of an alleged erroneous assessment of taxes against it, alleging that it was a national banking association, incorporated under the National Bank Act of the United States, with its principal office in the City of Richmond and that the City of Richmond had assessed a tax amounting to \$18,498.20 against it as of the first day of February, 1915, and further alleging that said assessment and levy was made under the ordinance approved April 9, 1915; that in June, 1915, the Commissioner of the Revenue as required by section 18 of the "Revenue Bill" had delivered to it a copy of the assessment list made by him (which is the list referred to in the evidence and marked Exhibit "H", Record, p. 32-32a) and demand made for the payment of the taxes assessed therein, and that thereupon, to escape the penalties which it would have incurred by its failure or refusal so to do, was compelled to pay, and did pay said taxes to said City of Richmond, although the said assessment list was made out on the form prepared by the Auditor of Public Accounts of Virginia and used in the assessment of taxes against stockholders of banks, banking associations, trust and security companies, after having been first furnished by the said Bank with a "Report" made out by the Bank on a form also prepared and furnished by the said Auditor, which Report is Exhibit "R", referred to in and filed with the Answer of your Petitioner. It was further alleged in said petition, that "instead of being levied and assessed by the City of Richmond against the stockholders of petitioner upon the value of the shares of stock held by them, respectively, was levied

and assessed by it in solido against the petitioner, based upon the aggregate of its capital, surplus and undivided profits, less the deductions therefrom," etc., and further that the said taxes so levied and assessed were taxes upon its capital and contrary to section 5219 of the Revised Statutes of the United States, and likewise contrary to section 1040-a of the Code of Virginia 1904, and further specially alleged that it violated said section 1040-a, which "in permitting the City of Richmond, in common with other cities and counties of the State, to tax the shares of the capital stock of such banks, National and State, as were located within its corporate limits, expressly restricted said City to the same rate of taxation upon such shares as should be assessed by it upon other monied capital in the hands of individuals residing in said City"; and accordingly levied and collected a tax at the rate of one forty on the hundred dollars of value, to wit, \$18,489.20, whereas your Petitioner was only entitled, under the statutes of the State, to assess and collect said taxes at the rate of thirty cents on the hundred dollars of value.

Said petitioner further alleged that the taxes complained of was also erroneous and illegal in that it violated section 168 of the Constitution of Virginia, which requires all taxes, whether State, local or municipal, to be uniform on the same class of subjects, within the territorial limits of the authority levying the taxes and in support of this allegation further alleged that a tax of only thirty cents upon each one hundred dollars of value on other intangible personal property was levied by the City of Richmond, and that the classification attempted to be thus made was without reasonable grounds to support it. It was further alleged that the said action of the City complained of was expressly prohibited by section 5219 of the Revised Statutes of the United States, which withheld altogether permission to tax national banking associations on their capital or otherwise, authorized a tax to be levied only against shareholders upon the value of shares in said institutions, subject to the express condition that said taxes should not be at a greater rate than were assessed on other monied capital in the hands of individuals.

It was further alleged that there were in the City of Richmond National Banking Associations, including the said Merchants National Bank, having a capital, surplus and undivided profits to the aggregate extent of \$10,706,532.72, from which, after making certain deductions, there was left a balance of \$8,326,521.11, upon which the City of Richmond assessed and collected of said National Banking Associations its taxes at one forty on the hundred dollars, to-wit, \$116,487.29, which was in addition to the State taxes thereon at thirty-five cents (35c.) on the hundred dollars, to-wit, \$29,121.82; that for said year there were also in the City of Richmond State banks and trust companies, the capital of which, after making similar deductions, aggregated \$5,094,385.19, upon which the City of Richmond assessed and collected at said rate of one forty (1/40), \$71,321.39, and the State of Virginia assessed and collected at said rate of thirty-five cents (35c.), \$17,830.35.

In order to justify its allegation that the classification of shares of bank stock for purposes of taxation into one class, and intangible

personal property in another class, was illegal, said petition set forth that for said year 1915 there were in the City of Richmond, bonds, notes and other evidences of debt to the amount of \$8,311,702, against which the owners thereof claimed and were allowed to deduct their indebtedness, amounting to \$4,521,983, leaving a net balance subject to taxation of \$3,789,719, upon which the City of Richmond assessed a tax of only thirty cents (30c.) on the hundred dollars, to-wit, \$11,369.15, and the State of Virginia assessed and collected a tax at the rate of sixty-five cents (65c.) on the hundred dollars, to-wit, \$24,633.17, and further, to justify its contention, it was alleged that the intangible personal property list mentioned aforesaid, "consisted of bonds, stocks and evidences of debt and represented other moneyed capital in the hands of individuals residing in said City and State within the sense and meaning of said section 5219 of the Revised Statutes of the United States and competed directly with the capital of petitioner and of the other national banking associations," etc., which constituted a discrimination and was a "gross, intentional and wilful discrimination on the part of the said City against petitioner and against its capital and the shares of stock representing the same," etc., and was further "in plain and obvious violation of section 5219 of the United States Revised Statutes."

Wherefore, said petitioner alleged that it was aggrieved and that it had a right to apply for relief "under section 571 of the Code of Virginia as at present amended."

At the hearing of said motion on said petition the City of Richmond appeared and filed a written motion to dismiss the proceedings and an answer in writing. The ground of the motion to dismiss the proceedings was that the Merchants National Bank had no standing in court to ask the correction of the alleged illegal assessment because said assessment and levy was not against it, but was assessed against the individual stockholders holding or owning stock in said bank, section 571 of the Code of 1904 limiting the right to the making of such a motion to the person assessed with such levies or other local taxes, and making profert of the assessment rolls in the office of the Commissioner of the Revenue, which showed that each individual stockholder was assessed with the taxes complained of and not the Merchants National Bank.

In the said answer of your petitioner it was admitted that the Merchants National Bank was incorporated and doing business as alleged in its petition, and that the taxes assessed on the stockholders of said bank amounted to \$18,489.20, and were assessed as of February 1, 1915, and that such assessment was in strict conformity to the law, but expressly denied that any taxes whatsoever had been assessed against the said Merchants National Bank; it was also denied that the assessment was made under the ordinance approved April 9, 1915, but, on the contrary, alleged that the said assessment, as required by statute and ordinance, was made as of February 1, 1915, and in strict conformity with sections 1 and 3 of the ordinance which became law February 13, 1906, embodied in Richmond City Code 1910 as sections 1 and 3 of Chapter 15 concerning the Levying of Taxes, which sections were quoted in said answer, and that said as-

assessment was also in strict conformity to sections 17 and 19 of Chapter 14 of Richmond City Code 1910 concerning the Assessment of Property for Purposes of Taxation, which said sections were also literally quoted in said answer; but it was denied in Clause 4 of said Answer that the Commissioner of the Revenue, when he delivered to the said Bank in June, 1915, a copy of the assessment, was acting under the Act of the Legislature which became effective on June 18, 1915, nor was he acting under the said ordinance of April 9, 1915, in so doing, but, on the contrary, he was acting in pursuance of the statutes and ordinances in force as of February 1, 1915. It was admitted, however, that the petitioner had, as required by the City, paid the taxes so assessed against the stockholders, one moiety thereof amounting to \$9,244.60 on the 17th day of June, 1915, and the other moiety thereof on the 22nd day of December, 1915.

Further answering the said petition it was set forth that even though the assessment complained of was made in pursuance of section 3 of the ordinance of April 9, 1915, yet when the whole of said section was read and properly construed it would be seen that the tax was not imposed upon bank capital, surplus and undivided profits as alleged in said petition but was, in fact, upon the shares of bank stock held by the stockholders, the value of which shares was to be ascertained by deducting from the bank capital, surplus and undivided profits the real estate owned by the Bank, and then dividing the remainder by the number of shares in said Bank, and that this process was in strict conformity with the Act of Assembly and by express direction of the said ordinance itself, where it was set forth that "the tax upon such shares of stock in any bank located and doing business in the City shall be assessed and collected in accordance with the provisions of the Act of the General Assembly of 1915," and further setting forth in said Answer that even though the part of the section quoted in said petition praying a correction of said assessment, is contrary to the Constitution (statute) of the United States, yet that part of said ordinance is separable from the rest and residue of said section, and may be declared illegal without in the least destroying the validity of that portion of the section above quoted, which was adequate to impose a tax upon the shares of stock when read in connection with the other ordinances in *pari materia*, thus adopting a system for the taxation of stock in National and other Banks which has been uniformly held to be constitutional and valid under the decisions of the highest court of this State and of the Supreme Court of the United States. It was also denied that the assessment made against the stockholders of petitioner was illegal and unconstitutional under section 1040-a of the Code of Virginia 1904, and also denied that the classification of certain intangible personal property in one class, and shares of bank stock in another was an illegal classification as alleged in said petition.

On the hearing of said motion of your petitioner to dismiss said proceedings and the motion of the Merchants National Bank to correct the alleged assessment, evidence both oral and documentary was introduced, all of which was made a part of the City's bill of exceptions No. 2 and was duly certified and made a part of the record.

By H. E. Tresnon, Commissioner of the Revenue for the City of Richmond it was sought to be shown that the assessment complained of was made under the ordinance of April 9, 1915, and was against the Bank and not against the stockholders, but in response to a question by counsel for the Bank, he said: "I made the assessment before that ordinance. The report of the Bank was complete before that ordinance was in effect. It was not in my power to change it." Again it was sought to be shown as a matter of fact that the assessment was against the Bank, because the personal property book of the City of Richmond, furnished to the Auditor of Public Accounts and also to the Collector of Taxes for the City of Richmond, contained only this entry: "Merchants National Bank, 1915, value \$1,320,662.11; tax on that value \$18,489.20." (Record, 38.)

The Bank itself furnished two receipts, covering the amount of taxes assessed against the stockholders of the Merchants National Bank, which the Bank, under the statute, is required to pay. Those receipts will be found on pages 42 and 43 of the Record, and recited that the sums so paid were in payment of taxes assessed against the stockholders of the Bank, the language in the first being: "Received of Merchants Nat. Bank Nine thousand two hundred forty-four and 60/100 Dollars, being one-half of City Taxes 1915 charged to Their Shares Stock," and the other receipt, dated December 22, 1915, being as follows:

"Bank

1915,

Merchants National Bank, To City of Richmond, Dr. a/c Shares Stock.

City Tax on Personal Property held as

above, for 1915	\$1,320,662.11	\$18,489.20
		9,244.60
		<hr/> \$9,244.20

Received payment. Collector's Office Dec. 22, 1915.
1/2

H. L. HULCE,
B. Collector."

Again at page 48 this witness, speaking of the taxation of intangible personal property in general said:

"National Banks were not included in that list because banks were taxed under a separate act entirely, and they had to make their reports under a separate act; it does not go on the personal property book at all."

This witness further said that he had been Commissioner of the Revenue for the City of Richmond since 1911, and that prior to that time he was connected with the office as an assistant back to the year 1904, and that the mode adopted for the assessment of City taxes on shares of bank stock for the year 1915 was the same that had been in vogue ever since he had first been in the Commissioner's office

(Record, p. 52), and that the entries made on the personal property book were the same that had been made during all of that time. He verified the paper, Exhibit R, filed with the Answer of the City of Richmond, as the report which the Merchants National Bank had made for the year 1915, which report was signed and returned by the Cashier on the 1st day of March, 1915 (Record, 53), stating that such report was not made in his office, but was made by the Bank itself and brought to his office, and was filed there on or about the first day of March, and that it was received by him as of February 1, 1915 (Record, 54). He expressly stated also that he made the assessment at the rate of one forty (1.40), because that was the rate provided by ordinance on February 1, 1915. He denied that there had been any assessment against the Merchants National Bank except that made by him upon the shares of stock. He further stated that the item of \$1,320,662.11, which appeared on the personal property book in the name of the Merchants National Bank for the year 1915 represented the value of the shares of stock of the Merchants National Bank for the said year, after making the proper deductions as prescribed by law (Record, 56); that the sum of \$18,489.20, found on the personal property book represented the tax on the value of the shares of stock at one forty, and that such values and tax were in conformity with the values reported by the Bank itself as above stated. He further stated that he had knowledge since 1904 that the banks of the City, including the Merchants National Bank, had uniformly made a report like the one identified by him and had uniformly paid the taxes for their shareholders without protest or objection on account of the legality of the manner of assessing the tax, or the unconstitutionality of the Act or ordinance. He further said that the rate of one forty was the same that had prevailed ever since the year 1904. He further said that a copy of the State statute on the subject of the taxation of shares of bank stock had been for years printed on the back of the forms provided for that purpose, and that the said report made by the Bank as aforesaid, and the assessment made by him, a copy of which was furnished the Bank, had printed on the back of each sheet a copy of the statutes on the subject of the taxation of shares of bank stock. (Record, 58-59.)

By exhibit "F" filed by the Bank itself, being a receipt executed by John T. Sale, Acting Auditor of Public Accounts, dated June 1, 1915, the payment of \$4,622.30 is recognized as having been made on account of the taxes assessed on the shares of stock of the stockholders of the said Bank, "For the support of the Government for the year 1915", and, "On account of taxes assessed on the shares of stock of the stockholders of the said Bank for the support of the Public Free Schools for the year 1915."

This witness identified Exhibit "H" as a copy of the assessment made on shares of stock of banks, banking associations, trust and security companies for the year 1915, and stated that a copy was certified to the Auditor as the assessment roll against banks and furnished a copy thereof to the Bank itself (Record, 66). He further said that a similar procedure was taken in the matter of assessing City

taxes (Record, 67). Immediately following will be found Exhibits "G" and "H" referred to in his testimony.

The most careful reading of the evidence in the case will not show that the effort of the Bank to establish that there was other monied capital in the City of Richmond assessed at a lower rate than the rate imposed upon those engaged in the banking business, which competed with Banks and Banking Associations, was utterly abortive.

The only evidence on that point is that of Mr. Thomas B. McAdams, the Vice-president of the Merchants National Bank. This witness was asked to state whether or not monied capital in the hands of individuals invested in bonds, notes and other evidences of debt, comes in competition with National Banks, answered: "Yes," and gives as a reason for his answer that the assets of his Bank are invested in bonds, notes and other evidences of debt, and hence the loan of money or the extension of credit is regulated or controlled largely by supply and demand, etc. (Record, 73-4.) This opinion of the witness the courts, both State and Federal, as will hereafter be pointed out, wholly dissent from. With this view also the trial Judge concurred, saying that what had been shown through Mr. McAdams was "too general", but that he would reserve to the plaintiff the right to show by testimony that some portion of intangible personal property might come in competition with National Banks.

Subsequently, Mr. Tresnon was recalled to sustain the contention and his evidence will be found on page 76 of the Manuscript Record but as your petitioner is advised, is wholly inadequate for any such purpose. He stated: "That the notes, bonds and other evidences of indebtedness returned and assessed for taxation for the year 1914 amounted to \$6,250,252; that municipal bonds returned and assessed for taxation for the year 1915 amounted to \$981,040.00; that real estate agents who negotiate loans on real estate are required by the State law to take out licenses as private bankers. There were forty-five such real estate agents who took out licenses as private bankers in the year 1915."

The case came on for final hearing on August 3rd, 1917, when the court held:

"That the levy, assessment and collection by the City of Richmond of the tax for the year 1915, in the petition complained of, is illegal and erroneous (1) because said tax, instead of being levied and assessed against the shareholders of petitioner, upon the value of their shares ascertained in the manner prescribed by law, was levied and assessed after the ordinance of said City approved April 9th, 1915, had become operative and was in force, and was levied and assessed by and pursuant to the express terms of said ordinance, and as so levied and assessed was a tax in solido directly against petitioner itself upon its capital, surplus and undivided profits less the assessed value of its real estate and other deductions allowed by law, contrary to the express prohibition contained in the Revenue Bill of the State of Virginia then in force, and (2), because instead of being at the legal rate of 30 cents on each \$100 of the assessed value of the shares of the petitioner, said tax was levied, assessed and collected at the illegal rate of \$1.40 on each \$100 of such value." (Record, p. 20-21.)

This holding of the court, of necessity, constituted the overruling of the motion of the City to dismiss the proceedings, and was so intended, as will be seen from the opinion of the court, which is made a part of the record (Record, 23-30), the language of the learned Judge on that point being as follows:

"The first question, therefore, to be decided arises upon the motion by the City to dismiss these proceedings, which motion is in the nature of a plea in bar. The determination of that question leads to the inquiry—whether this assessment was made against the stockholders of the bank upon the shares of stock held by them, respectively, or upon the bank in solido, upon its capital, surplus and undivided profits. If it was an assessment against the stockholders, then it seems from the authorities cited, that the bank would have no right to file this petition and the same should be dismissed; but if the assessment was made against the bank upon its capital, surplus and undivided profits, then the rights of the bank to file this petition and ask for relief must be sustained."

To the overruling of your petitioner's motion to dismiss these proceedings the City of Richmond excepted and filed its Bill of Exceptions No. 1 (Record 31); and to the entry of the order exonerating the Merchants National Bank, your petitioner also excepted, and filed its Bill of Exceptions No. 2 (Record, 32-76), and after the order had been entered your petitioner moved the court to set aside said order and grant it a new trial, which motion the court overruled and to which action of the court your petitioner filed its Bill of Exceptions No. 3 (Record, 77), all of which Bills were duly certified and filed by leave of the court (Record, 30).

Errors Assigned.

First. It was error for the court to overrule the motion of the defendant to dismiss the proceedings.

(1) For the reasons and upon the authorities submitted to the learned judge of the court below it was admitted by him that the defendant's motion should be granted and the proceedings dismissed if the assessment was against the stockholders and not against the bank in solido. These authorities cited and the grounds upon which the defendant's contention rested need not be now here repeated for the reason that since the decision of the case in the court below this Honorable Court has expressly determined, in the case of Main Street Bank, Inc., vs. City of Richmond and the Commonwealth of Virginia, 15 Va. Ap. 481, that if the assessment was against the stockholders the bank (defendant in error) would have no standing in court to ask for relief from an alleged erroneous assessment, and the judgment of the court below must of necessity be reversed, unless, as determined by the court below, the assessment was an assessment against the bank in solido and not against the stockholders.

(2) It is confidently maintained that the assessment complained of was, under all the circumstances of the case, an assessment against the stockholders and not against the bank.

In the case of the Union Bank vs. City of Richmond, 94 Va. 316, which was an action at law brought by the bank to recover back taxes collected by the City of Richmond, the question of the jurisdiction of the court on the ground here argued arose, but, as stated by the learned Judge Harrison, the same was neither considered nor passed upon, but expressly reserved.

The jurisdiction invoked in this case was undoubtedly statutory, conferred (by the admission of the defendant in error in his petition) under section 571 of the Code of 1904, as amended by the Act in force March 10, 1914 (Acts 1914, p. 78), and is subject to two distinct concurrent limitations, which it was the duty of the defendant in error to show by a preponderance of the evidence to exist (1) That the person making application must be some "person assessed with county or city levies," and (2) That such person or persons must also be aggrieved by reason of the assessment.

So far from the defendant in error having established the existence of these essentials, it is easy to show from the evidence the negative of these propositions.

The original act providing for the assessment of shares of banks or banking associations will be found in the acts of 1870-71, at page 290 (inserted in the Code of 1873 as page 305), the title of the Act being, "An Act to provide for the assessment of shares of banks or banking associations, authorized by the laws of this State and of the United States, and imposing a tax thereon". Following this Act was an act approved April 3, 1874 (Acts 1874, p. 361), and an Act approved February 5, 1875 (Acts 1874-5, p. 62), each entitled: "An Act to provide for the assessment of shares of banks and banking associations, authorized by the laws of this State and of the United States, and imposing a tax thereon". By this last Act the Act approved April 3, 1874, was expressly repealed. The substantial provisions of the last foregoing Act were incorporated into the "Tax Bills", one approved April 22, 1882 (Acts 1881-2, p. 504), and the other approved March 15, 1884 (Acts 1883-4, p. 568), as section 17, and was continued by authority of section 579 of the Code of Virginia 1887, until the Act of April 16, 1903 (Acts 1902-3-4, p. 163), when the present more perfect mode for the ascertainment of the value of the shares of banks and the assessment of taxes thereon was enacted, as sections 17, 18, 19, 20, 21 and 22 of said Act (Acts 1902-3-4, p. 163-165.)

While it is true that previous to the last mentioned Act banks were not specially required to make a report, yet under the general provisions contained in the tax laws of the Commonwealth of Virginia Commissioners of the Revenue were required to furnish taxpayers forms or lists for the valuation of their property, which they were required to return to the Commissioner of the Revenue and to make an affidavit of their correctness, etc. (Code 1873, p. 300, sec. 52; Code 1887, sec. 494.)

By section 17 of the last mentioned Act (1903) it was expressly

made the duty of each bank, banking association, trust or security company, on the first day of February in each year "to make up and return to the Commissioner of the Revenue of the county, city, town or district in which said bank, banking association, trust or security company is located, a Report in which shall be given the names of stockholders, their residence, the number of shares owned, held or controlled by each, and the market value of said stock." This last mentioned Act, with its amendments made prior to the assessment of the tax in question was printed on the back of the form for the report, prepared by the Auditor of Public Accounts of the State of Virginia, which report, as the evidence shows, was made up by the Bank itself and returned to the Commissioner of the Revenue, and in further obedience to said statute, the Commissioner of the Revenue ascertained first the value of each share of stock in the mode required in said Act, and opposite the name of the stockholder, which the report made by the Bank contained, extended the number of shares of stock and the value of each share, and the tax chargeable to each stockholder. The fact that this procedure was had in strict conformity with the Act, as shown by the uncontradicted evidence of the Commissioner of the Revenue as hereinbefore set forth. He not only said that the law was strictly complied with but said further that this mode of assessing banks had been in vogue to his knowledge since the year 1904. (Record, 52.) Not only had the Bank voluntarily made the report required by the statute, but upon the making of the assessment roll by the Commissioner of the Revenue, a copy of which he said was furnished to the Bank, of which there is no denial, but on the contrary, it was shown that the bank voluntarily came forward and paid the tax and at the trial produced receipts for the two payments, which on their face state that the payment was made on account of the tax assessed upon the shareholders of the Bank (Record, 42-43). Not only is this true, but the Bank, through its counsel, produced and filed as Exhibit "F," another receipt showing the payment of the tax assessed in favor of the State, upon the shares of stock, which assessment was shown on the same assessment roll as the assessment for City taxes, the receipt reciting that the payment was made "on account of taxes assessed on the shares of stock of the stockholders of said bank, for the support of the government for the year 1915," repeating the quoted language with reference to school taxes, that it was "on account of the Public Free Schools" for that year.

The learned Judge, after holding in his opinion that the assessment against the defendant in error was made, not under the ordinance in force on February 13, 1906, but under the ordinance of April 9, 1915, in order to justify such holding, quotes the following language from the ordinance of April 9, 1915:

"There shall be levied and collected for each fiscal year the taxes following, to-wit, * * * on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital, surplus and undivided profits, one and fifteen hundredths per centum of value, provided, that for the year 1915 the tax on bank

capital, surplus and undivided profits shall be one and four-tenths per centum of value; * * *

It is submitted, however, that in this quotation the learned Judge failed to add thereto the next sentence which follows without a paragraph, and is in the following language:

"The tax upon such shares of stock in any bank located and doing business in the City shall be assessed and collected in accordance with the provisions of the act of the General Assembly 1915."

It may properly be asked what act is there referred to? Undoubtedly either the Act approved March 15, 1915, which became effective June 15, 1915 (Acts 1915, Extra Session, p. 115-117), or the Act approved March 18, 1915, which became effective June 18, 1915 (Acts Extra Session 1915, p. 209-213).

In each of these Acts by section 17, it is expressly provided that "no tax shall be assessed upon the capital of any bank or banking association, authorized under the authority of this State or of the United States, nor upon the capital of any trust or security company chartered by this State, but the stockholders of such bank, banking association, trust and security companies shall be assessed and taxed on their shares of stock therein."

So that coupled with the language relied on by the Judge to justify his conclusion was the positive edict of the legislature that no taxes should be assessed upon the capital of any bank.

It cannot be successfully contended that this reference to the State legislation of the year 1915, did not in effect make it a part of the ordinance itself, and while even under the general doctrine that laws in *pari materia* must be read in construing the language of an ordinance, yet here it is made clearer and more imperative, if possible, that the statutes of 1915 were to be read in connection with the ordinance, for they were in effect a part of it. It is fundamental that the construction of ordinances must, where possible, be reasonable, Judge Dillon saying on this subject:

"In prosecutions of actions to enforce ordinances or in considering the question of their validity, courts will give them a reasonable construction, and will incline to sustain rather than overthrow them, and especially is this so where the question depends upon their being reasonable or otherwise. Thus, if by one construction an ordinance will be valid and by another void, the courts will, if possible, adopt the former." (2 Dillon on Municipal Corporations, Sec. 446.) This language of the learned author is expressly quoted and approved in *Harman vs. Chicago*, 140 Ill. 374, 396; *Berry vs. Chicago*, 192 Ill. 154, 156; *Attorney General vs. Remick*, 73 N. H. 25, 30, and *Durango vs. Colorado*, 27 Colo. 169, 172.

May it be asked, what could be more unreasonable than for the City to attempt to do by an ordinance, what the State statute expressly prohibited. It may be true that some of the language used in the ordinance is not *secundum ordinem*, but, as was held in *Whitlock vs. West*, 26 Conn. 406, in view of the in-

artificial character of town by-laws, they are specially entitled to a reasonable construction.

In *Municipality No. 1 vs. Cutting*, 4 La. An. 365, it was held that the strict rules on which the validity of penal statutes are to be tested are not to be applied to by-laws or ordinances of municipalities. It is well remarked that "The by-laws of very few of these municipalities can stand such a test. They should receive a reasonable construction and their terms must not be strictly scrutinized for the purpose of making them void."

Judge Cooley in his work on *Taxation*, says:

"It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give it due investigation or reflection. The presumption, on the other hand, must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed. This is the general rule in constitutional law when the validity of legislation is involved, and it is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid." (1 *Cooley on Taxation*, p. 184-5.)

It was said by this Honorable court in the case of *Bowe vs. Richmond*, 109 Va. 254, 257, speaking through Buchanan, Judge, delivering a unanimous opinion that while state statutes and municipal charters may be incongruous and difficult of construction, so as to give effect to all the provisions of each, yet "they must be made to harmonize as far as possible."

In the recent and able work of McQuillin on *Municipal Corporations*, it was said:

"Where the ordinance is open to two constructions, one legal and the other illegal, if possible, the former will be adopted. Although it is desirable that by-laws should be so free from doubt that 'he who runs may read,' yet as even in the case of higher legislative bodies this is not always possible; and the courts should strive to so construe a by-law as to give reasonable effect to the object aimed at. Scrutiny unreasonably rigid will not be restored to in considering the meaning of by-laws. A by-law will not be declared void because of a "want of clearness of expression or a difficulty in construing or adopting its provisions." All doubts are resolved in favor of the validity of the ordinance. The presumption is in favor of the validity and the burden is upon the one who asserts its invalidity, to demonstrate it.

"Ordinances are to be tested by the Charter or local constitution.

"An ordinance passed by virtue of a State statute fixing the time and manner of holding certain elections has the same power and effect and is to be interpreted as part of the statute itself.

"Ordinances are to be construed in harmony with the laws and general legislative policy of the State. Ordinarily, the ordinance will not be so construed as to effect a repeal of the general State law with which it conflicts.

"Ordinances and by-laws should be so construed as to give every part of them effect, if possible. The court cannot insert words, qualifications or conditions and thus amend the ordinance. Its province is to construe only. If possible every clause and word in the ordinance will be given full force and effect." (2 McQuillin on Mun. Corps., Sec. 810, citing many cases from almost every State in the Union.)

Among the cases so cited is *Schmidt vs. City of Indianapolis*, 168 Ind., 631 S. C., 14 L. R. A. (N. S.) 787, 794, which called in question the validity of an ordinance, where it was said:

"It is the duty and the uniform rule of this court, when the constitutionality of a statute is under consideration, to construe and interpret its provisions, if possible, so as to sustain and not defeat the act in question."

This is undoubtedly the doctrine adopted by this Honorable Court.

The cases to that effect are familiar to the court, among them only need be cited, where Keith, P., speaking for the court, adopting the language of Mr. Justice Story in *U. S. vs. Winn*, 3 Summer 209, said:

"In short it appears to me that the proper course in all these cases is to search out and follow the true intention of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature." (*Northrop, etc., vs. Richmond*, 105 Va. 335, 339-40.)

It is to be observed that this holding was made in the construction of the language of an ordinance of the City of Richmond.

So doing let the language: "On bank capital, surplus and undivided profits, less assessed value of real estate included in such capital and undivided profits," be read in connection with the subsequent language of the section, viz.: "the tax upon such shares of stock in any bank located and doing business in the City." Does not a reasonable construction require the last language to modify and explain the first, and, in effect, provide for the taxation of shares of stock in banks rather than the taxation of bank capital, etc.? Especially is this true in view of the language used in the legislative act by which the Commissioner of the Revenue is required to ascertain the value of the shares of stock. Referring to that act section 17, the following language will be found: "From the total value of the shares of stock of any such bank, banking association, trust or security company, which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted the value of the real estate otherwise taxed in this State

* * * And the actual value of each share of stock shall be its proportion of the remainder." In the light of this situation should it not in all fairness be concluded that the quotation first made was intended only to adopt as a part of the ordinance, the mode provided in the legislative act for the ascertainment of the value of the shares of stock. This is made clearer when the peculiar language of the last quotation is scrutinized. What could be meant by "taxes upon such shares of stock," if it did not mean the shares of stock in a bank the value of which were to be ascertained by considering "bank capital, surplus and undivided profits, less value of real estate included in said capital, surplus, and undivided profits." Such was the construction placed upon the ordinance when read as a whole by the Commissioner of the Revenue, for the report of the Bank and the assessment roll made out by the Commissioner and furnished to the Bank follows in every detail the legislative act in the ascertainment of the taxes against the shares of stock. There is not one semblance in the proceedings going to show that any tax whatever was levied in favor of the City upon the "capital, surplus and undivided profits" of the defendant in error, except the bare entry on the personal property book of the City of Richmond, which entry is not sustained by any report made by the Bank, nor upon interrogatories required in every case to be filed with the Commissioner of the Revenue by persons, firms or corporations subject to a tax. (Code of Va. 1904, Sec. 494; Acts 1915, p. 220.) Concerning this entry the Commissioner of the Revenue said:

XQ. Mr. Tresnon, how long have you been Commissioner of the Revenue?

A. Since September, 1911.

XQ. Were you connected with the office of Commissioner of the Revenue of Richmond prior to that time?

A. From July, 1904, to September, 1911.

XQ. Is the mode which you adopted for the assessment of City taxes for the year 1915 on shares of bank stock the same that has been in vogue ever since you have been in the Commissioner of Revenue's office?

By Mr. Pickrell: Objected to as clearly irrelevant.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. On the same principle, yes.

XQ. Were the entries made similarly upon the books each year as the book you produced in court to-day?

A. Similar entries, yes.

XQ. Has there been entered upon any book the names of the share-holders or owners of the shares upon an assessment of City taxes?

A. Not to my knowledge.

XQ. Has it always been entered in the name of the bank?

A. Always has.

XQ. As you have exhibited to the court here to-day?

A. Yes.

XQ. There is filed a paper with the answer of the City of Richmond, marked Exhibit "R." Will you please examine that paper and say whether or not that was furnished by you by the Merchants' National Bank?

A. Yes, this is a copy of the original report made by the bank.

XQ. Was that report signed and sworn to by the cashier of the bank, as the copy shows?

A. This report was signed by the cashier on the 1st of March, 1915, but there is no affidavit on the report furnished by the bank or by the cashier to the Commissioner of Revenue required. I see no affidavit on the report.

XQ. By whom was this paper, the original of which I now hand you from which the one just referred to was copied—by whom was that made out, in whose handwriting, if you know?

A. I don't know whose handwriting it is.

XQ. Was it made out in your office or made out at the bank?

A. The original was not made up at my office, but the copy was. The original was made out at the bank.

XQ. Was it brought to your office?

A. Yes, it was brought to my office.

XQ. It bears date on March 1st, 1915.

A. Yes.

XQ. Was that the date, or about the date, it was filed in your office?

A. Yes, about that time.

XQ. It states on its face that it is a report made February 1st, 1915. Did you receive it or not as such?

A. I received it as a statement of February 1st—a bank statement.

XQ. On what date? When did you receive it?

A. March 1st—about March 1st.

XQ. Was there any ordinance in force that you know of that changed the system of taxation as of March 1st from what had been since 1906?

By Mr. Pickrell: I object to the question. The ordinances speak for themselves.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. On the 1st of March there was no new ordinance in effect at that time.

XQ. Now who made this assessment in controversy here. Did you make that assessment in pursuance of the ordinance in force at the first of the fiscal year?

By Mr. Pickrell: The question is objected to because the witness has already testified he made it in pursuance of the ordinance of April 9th, 1915.

By the Court: Objection overruled.

By Mr. Pickrell: Exception.

A. I made out the assessment on the banks as the ordinance was in force at \$1.40 because there was no change in the \$1.40 rate as of February 1st, 1915.

XQ. This ordinance has this provision in it: "provided that for the year 1915 the tax on bank capital surplus and undivided profits shall be one and four-tenths per centum of value." Did you make any assessment on the banks for the year 1915 other than that assessment on shares of stock?

A. No other assessment.

XQ. Did you make any assessment under the ordinance that was in force on February 1st of the capital, surplus and undivided profits of the bank?

A. No, sir, I made no other assessment except at the \$1.40 rate.

XQ. On what?

A. As of February 1st, 1915.

XQ. Against the bank or against the stockholders?

A. We aggregated it against the stockholders and charged it up to the cashier of the bank.

XQ. Why did you do that?

A. Because it has always been the custom.

XQ. Does not the statute require it?

A. Yes, sir.

XQ. Mr. Treshon, the assessment book here on page 65, for the year 1915, Madison Ward, A #2, gives a list of banks. Included in that list I find the Merchants National Bank and then there appears \$1,320,662.11. What does that mean? There is no heading to the column under which I find that. What does that stand for?

A. Aggregate value of shares of stock of the Merchants National Bank.

XQ. For what year?

A. For the year 1915, after making the proper deductions as prescribed by law.

XQ. I find opposite that, in another column, \$18,489.20. What does that represent?

A. That represents the tax on that value just read at \$1.40.

XQ. Now look at Exhibit "R" and state whether that corresponds with the book, and if not, what difference is there?

A. The value assessed there is the same value as was reported by the bank for taxation after they made the proper deductions.

XQ. How long, to your knowledge, has the Merchants National Bank been making reports similar to the one that was made in this case, and been paying taxes for its stockholders as they paid for the year 1915?

A. Since 1904, to my knowledge.

XQ. Since 1904 they have uniformly made a report like that, and uniformly paid the tax?

A. Yes.

XQ. Have you ever had any objection from them on that account?

A. None whatever.

XQ. Did they ever call in question the constitutionality of the law under which they were acting?

By Mr. Pickrell: Excepted to as improper and irrelevant.

A. No, sir.

XQ. How long had the rate been \$1.40?

A. Since 1904, to my knowledge.

XQ. They were not only paying it in that manner, but at that rate?

A. Yes.

XQ. If there is any discrimination against them, how long has that discrimination existed?

By Mr. Pickrell: Objected to as clearly improper.

By the Court: Objection sustained.

XQ. Please look at the original return, which you say was made up by the bank at their banking house and returned to you, bearing date on March 1st, 1915, and state whether or not there is not printed upon the back of that return a copy of the State statute regarding the taxation of banks and trust and security companies, which shows that Section 17 was amended as of January 30th, 1912, and that Section 18 was amended as of March 12th, 1908, and that remaining sections—19, 20, 21 and 22—were part of the act approved April 16th, 1903.

A. Yes, that law is printed on the back of the report.

XQ. By whom was that furnished?

A. That was furnished by the State Auditor.

XQ. How long has it been the practice to have the reports from banks made out on a form similar to that with the act printed on the back of it?

A. Since I have been connected with the office they have been made on similar reports furnished by the State for that purpose.

It is to be observed that the language in the quoted sentence of the ordinance, "shares of stock in any bank," is preceded by the significant word "such," the whole sentence being as follows: "The tax upon such shares of stock in any bank located and doing business in the City shall be assessed and collected in accordance with the provisions of the Act of the General Assembly 1915." Giving to this language its proper import, and to the word "such" a meaning which the canon of construction requires, it is incontestable that the language must be specially applied to the details concerning the assessment and collection of taxes on shares of stock in banks. So doing the whole of said section when read clearly imports that the assessment for taxes, so far as banks were concerned, was to be upon the shares of stock in a bank and not upon the bank itself. To say, as the learned Judge of the court below in effect said, that the mere entry of the name of the Merchants National Bank in connection with the aggregate value of the shares of stock, and the aggregate amount of tax upon such aggregate of values, amounts to an assessment against the bank, seems to your petitioner to be nothing more

nor less than "*Qui haeret in litera, haeret in cortice*," even though it be admitted that the learned Judge of the court below was entirely correct when he held that the assessment of personal property for taxation involves, "first, the ascertainment of the character and value of the property; second, the fixing of the rate prescribed by law; and, third, the extension of the amount of the tax."

But it is to be borne in mind concerning the first proposition, as said by this Honorable Court in *Commonwealth vs. Iverson Brown*, 91 Va. 762, 767, that

"The Constitution does not prescribe that the valuation of all property for taxation shall be ascertained in the same way or manner. It is not even implied. In the nature of things it could not be done. The many kinds or species of property with their adverse characteristics render it impossible. The valuation is to be ascertained as prescribed by law—that is, by the legislature—and in as just a manner as possible; and on such valuation the same rate of tax shall be imposed as on other property, so that 'no species of property * * * shall be taxed higher than any other species of property of equal value.'"

In the petition filed in the Hustings Court praying exoneration from the tax it is insisted that the entry in the personal property book, read in connection with the ordinance of the City of April 9, 1915, made it a tax in solido against the bank and not against the stockholders, which allegation is denied in the answer of the City of Richmond, and in the argument to sustain this contention, much stress was laid upon section 509 of the Code of Virginia 1904, the language of which is as follows:

"Sec. 509. Commissioner to extend levies and taxes; compensation therefor. The commissioner shall extend in his land book and book of personal property the county and city levies, including the school and road tax; and for this additional service he shall receive such compensation as the board of supervisors or council, as the case may be, may deem reasonable."

It goes without saying that this section should be construed in connection with acts on this subject in *pari materia*, but apart from that, said section was amended by an act which went into effect June 17, 1916 (Acts 1916, p. 731), which, so far as concerns the question under discussion here, was made to read as follows:

"Sec. 509. Commissioners to extend^{*} levies and taxes; compensation therefor.

"The commissioner shall extend in his land book and book of personal property the total of the county and district levies, or city levies, as the case may be, including the road and school levies, so as to show the aggregate amount of all such levies assessed against each person assessed with State taxes on said books. The commissioner of the revenue shall recapitulate the levies in such form as the auditor shall prescribe."

It cannot reasonably be doubted that this amendment was intended to make clear, by express language, what was before that time a matter of construction.

By subsection 2 of section 1040-*a* of the Code of Virginia 1904 (held by the decision of this court in the case of *Treshon vs. Supervisors*, 120 Va., S. C. 90 S. E. 615; 13 Va. Ap. 172, to be still in force), it is provided as follows:

"That in so taxing said shares the said county or city authorities respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares."

This provision is recognized and reinforced by an act in force June 15, 1910 (Acts 1910, p. 43), where it is provided as follows:

"4. For the purpose of local taxation, as contemplated by section 1040-*a* of the Code of Virginia, the location of every branch bank shall be considered to be in the county, city or town in which the banking house or offices of such bank are situated, and the shares of stock of every such bank shall be subject to local taxation in the county, city or town in which its banking house or offices are situated, in the manner and by the methods now provided by law for the assessment and taxation of such bank stock."

These statutory provisions clearly show that the City could not, if it would, have followed its own ordinances in the assessment of shares of bank stock, for they were at variance with the requirements of the State statute in the matter of the assessing of City taxes. Like the system of assessment under consideration in the *Iverson Brown* case, the assessment here was special and not to be in accordance with the general requirements of the State and City for the assessment and collection of taxes in general.

Hence the instructions given by the Auditor of Public Accounts to Commissioners of the Revenue expressly require that they should not "enter on the personal property book any property assessable with levies for City purposes which is not assessable on personal property book with State taxes, for instance, the capital of merchants and shares of bank stock assessed for City purposes must not be assessed on the personal property book nor must the tax on dogs be assessed on the personal property book. Should any such property be entered thereon the book will be returned to the commissioner for correction." (See Personal Property Book City of Richmond, Lee Ward, for the year 1915, inside of cover).

By reference to section 487 of the Code of Virginia 1904 prescribing the form and defining what should be entered on the personal property book in force for the years 1914-1915 it will be seen that the instructions so given by the Auditor were in strict conformity with the statute, it being provided in said section for the year 1914 that personal property, estate, moneys and credits which are expressly exempt by law or otherwise taxed shall not be entered in such book (Va. Tax Laws 1914, p. 150),

and by the same section in force in the year 1915 it is provided as follows: "Any property not assessable on the personal property book with State taxes, because the State has provided otherwise for its assessment shall not be entered on the personal property book, notwithstanding localities have the right to assess any such properties with local taxes." (Va. Tax Laws 1915, p. 130.)

The most careful reading of the statute providing for the assessment of taxes by the State will not disclose any requirement or intimation, even, that the names of the shareholders or the name of the bank itself are to be entered on the personal property book of the State, which is required by section 504 of the Code of Virginia 1904 to be made out, verified and filed by the Commissioner of the Revenue.

By the Act approved March 18, 1915, which became effective June 18, 1915 (there being no emergency clause to said act), section 18 of the act taxing shareholders in banks, provided as follows:

"Section 18. (As amended by act approved March 18, 1915), it shall be the duty of said commissioner of the revenue, as soon as he receives such report, to assess each stockholder upon such actual value of the shares of stock owned by him a State tax of thirty-five cents on every one hundred dollars thereof, of which twenty-five cents shall be applied to the governmental expenses of the State, and ten cents thereof shall be applied to the support of the public free schools of the State as provided by law.

"It shall likewise be the duty of the commissioner of the revenue of each city of the State to assess upon such stockholders a tax, to be levied by the city council or other governing bodies of, not exceeding one dollar and fifteen cents on every one hundred dollars value thereof; provided that such city council or governing body may, in its discretion, direct said commissioners of the revenue to deduct from the value of such shares of stock of such bank for the purpose of local taxation only, the value of any municipal bonds of that particular municipality held by such bank." (State Tax Laws 1915, pp. 22-25; Acts 1915, Extra Session, p. 209.)

Before this act there had never been any reference, in any act taxing the shares of banks, for State purposes to the taxation of shares of banks for local purposes.

The Auditor of Public Accounts in the preface to the "Virginia Tax Laws for 1915," compiled by him, says concerning the Act last above quoted from that: "This act did not contain the emergency clause. These sections, as amended, will not apply to the assessment for 1915, but will apply to the assessment for 1916."

If it be true, however, which is not admitted, that the assessment, as held by the Judge of the court below, was not made as of February 1, 1915, under the ordinances of the City as they stood on that date, but was made under the ordinance of April 9, 1915, it would likewise follow that the State assessment for the year 1915 was made under the Act of assembly of March 18, 1915, which became effective June 18, 1915, and the instructions of the Auditor of Public Accounts to the Commissioners of the Revenue, found in the preface to

the tax laws of 1916 at page XVIII would be applicable. He there says:

"Bank, Trust and Security Companies.

"Chapter 142, approved March 18, 1915, page 209, Acts of Assembly, extra session, 1915, amends sections 17, 18, 19, 20 and 22 tax laws, which provide for the assessment of shares of stock of banks, banking associations, trust and security companies.

"These sections as amended do not authorize deduction on account of indebtedness of stockholders as was formerly allowed. The assessments required by these sections are not made upon the personal property book nor are these shares of stock reported upon the personal property book interrogatories, because the bank, banking association, trust or security company, is required to report to the commissioner of the revenue, and the commissioner of the revenue is required to make the assessment, and the Auditor of Public Account furnishes blank forms for the reports and assessments."

But suppose, for the sake of the argument, that there was some requirement which made it the duty of the Commissioner of the Revenue to enter the name of the stockholders upon the personal property book, yet your petitioner humbly submits that such requirement, in view of all the circumstances of this case, was "directory" and not "mandatory."

Judge Cooley, in discussing the question of what constitutes "directory" and what "mandatory" requirements in taxing statutes, says:

"No one should be at liberty to plant himself upon the nonfeasances of officers, under the revenue laws, which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty. On the other hand, he ought always to be at liberty to insist that directions which the law has given to its officers for his benefit should be observed. Many eminent jurists have endeavored to lay down a general rule on this subject, by which the difficulties in tax cases may in general be solved. In one of the most recent cases in which this has been attempted, the general doctrine is stated as follows: "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power, to render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words, importing that the act required shall not be done in any other manner or time than that designated." (1 Cooley on Taxation, p. 479-80.)

Again in a note on page 488, it is said:

"Statutory provisions as to the time of completing, verifying, returning, delivering or filing the assessment roll held to be directory merely." (Citing cases from Iowa, Ky., N. Y., Pa., Ala., Mich., and 63 Fed. 76.)

In the case of *Mears vs. Dexter*, 86 Va. 828, will be found an excellent discussion of this question by Lewis P. The learned President there quotes the holding of Lord Mansfield in *Rex vs. Loxdale*, 1 Burr. 447, quoted with approval in *Cooley on Const. Limitations*, at page 74. It was there said:

"There is a known distinction between circumstances which are 'of the essence of a thing required to be done' by an act of Parliament, and clauses merely directory."

In *French vs. Edwards* 13 Wall. 506, it was said:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their powers or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected."

And again in *Segwick on St. and Const. Law* (Pom. Ed.), at page 316, it was said:

"Where statutes direct certain proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed. In these cases, by a somewhat similar use of language," he adds, "the statute is said to be directory. In other cases the statute is held to be imperative or mandatory."

The doctrine laid down in the *Mears* case has been cited and approved in *Stearns vs. Richmond*, 88 Va. 992, 999, and in *N. & W. R. Co. vs. Dunnaway*, Admr., 93 Va. 29.

An equally good discussion of the subject will be found in *Redd vs. Supervisors*, 72 Va. (31 G.) 695, 700 (supra), where *Burks, J.*, said:

"Substantial compliance with the law in every essential feature is all that is necessary. 'The sound doctrine,' says a learned author, 'is, that compliance, with all substantial or material conditions is essential'. 1 *Dillon on Municipal Corporations*, Sec. 108.

"Nor must we fail to distinguish between provisions that are mandatory and such as are directory merely; by which latter is meant those provisions that are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them. *Cooley's Constitutional Limitations*, 74,

marg. p. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. Id., 78, marg. p."

There are many cases which fully sustain the contention of your petitioners, that the entry of the name of the taxpayer in any particular book or record is not necessary. Among these we beg to cite the following:

In *Bank vs. Waters*, 7 Fed. 152, it was held that the omission of the City Clerk to extend upon the assessment roll the amount to be paid by each shareholder until after such roll had been delivered to the State treasurer does not render the taxation of such shares void.

In *People vs. Hulin*, 237 Ill. 122, 128, the holding in *People vs. Chicago*, 214 Ill. 190, was approved, the court saying:

"To expect the ordinary citizen to observe every possible formality and the strict letter of the statute concerning non-essentials,—matters that cannot affect the substantial justness of the tax,—and to defeat the tax if that be not done, upon technical objection that some mere form has not been complied with, is, in a sense, to defeat the means of government itself. Such was not the intention of the law and is not the duty of the courts."

In *Wilcox vs. City, etc.*, 128 N. Y., (Ap. Div.), 227, it was held that:

"The charter of the city of Mount Vernon requires a tax levied by the common council to be apportioned and extended on a separate roll for each ward. The assessors, however, prepared a roll for the whole city in a single volume, and this roll was confirmed by the common council. Without extending the tax in this book the assessors, pursuant to a resolution, copied the assessment into a separate book for each ward and extended and apportioned the tax therein. Held, the statute was substantially complied with and the tax so apportioned was a lien upon the property affected thereby."

In *1 Desty on Taxation*, at page 515, the following is laid down as the general principle which should govern the court in determining whether a provision in a taxing law is mandatory or merely directory:

"106. Statutory provisions regulating the assessment and levy of taxes are mandatory when their object is the protection of the taxpayer; but regulations intended to promote dispatch, method, system, and uniformity in modes of proceeding are merely directory. There must be a rigid adherence to the directions and forms of the statute, where these are intended for the protection and benefit of the owner of the property; but where the act is merely directory, the validity of

the acts of the officer under it does not depend upon conformity strictly to its requirements."

In *State vs. Taylor, Collector*, 35 N. J. L. 184, 188, it is said:

"There must be every proper intentment in favor of the proceedings of public officers, especially where no substantial wrong appears to have resulted to the plaintiff, by reason of any alleged omission of duty."

And again at page 190, it is said:

"Most of these, however, can be answered in general terms. In laying the burdens of taxation upon the citizens of the State, while it must be the object of every just system to equalize this charge by a fair apportionment and levy upon the property of all, it is equally the duty of the courts to see that no one, by mere technicalities which do not affect his substantial rights, shall escape his fair proportion of the public expenses, and thus impose them upon others.

"A liberal construction must, therefore, be given to all tax laws for public purposes, not only that the officers of government may not be hindered, but also that the rights of all taxpayers may be equally preserved."

The holdings in the last foregoing cited case were followed in *State vs. Van Horn, Collector*, 40 N. J. L. 143, 145, where it was said:

"The rule seems to be, that so far as the assessment itself is concerned, that unless the statute under which it is made is so framed as to compel a construction that an assessment is to be made to an owner of land by lot or lots, or upon the entire tract, or by specific description, the owner's substantial interest is only in the amount assessed, and if a correct amount is secured, the method of arriving at it, whether by an assessment by lot or by an assessment by block or in bulk, is only matter of form and not of substance."

"Every direction of statutes as to manner of assessing will, when possible, be construed as directory merely. *State vs. Taylor, Collector*, 6 Vroom 184." (35 N. J. L.)

In *State Auditor vs. Jackson*, 65 Ala. 142, will be found an excellent discussion of the question under consideration. The learned Judge (Stone) delivering the opinion of the court, at page 153, reaches the following conclusions:

"In *Hilliard on Taxation* (ch. 1, sec. 78), it is said: 'Upon the question, whether the taxing power, and the forms and proceedings by which it is exercised, are, in doubtful cases, to be construed in favor of the government or the citizen, it is held that a tax is to be presumed to have been properly levied, and that taxation for public purposes is to be construed liberally. * * * The operations of government cannot be carried on without the expenditure of money, and that expenditure must be supplied by taxes, collected from its citizens. The power to tax, therefore, is inherent in government. From the very nature of the case such a power is supreme.

"In *Buck vs. People*, ex rel. 78 Ill. 560, it is held: 'It will be presumed that taxes are properly and legally assessed, and are legally and justly due, in the absence of proof to the contrary.' In that case it was said: 'All of the objections in this case are merely technical and devoid of merit. There is no pretense that the property of objectors is not liable to be rated, nor that they are unfairly or unjustly assessed; nor do they claim that a greater rate is imposed upon them, than on other citizens of the district; nor that the amount levied is not indispensable to the county and township governments, the keeping of roads and bridges in repair, and for the maintenance of schools, and the preservation of order in the villages of the county.'

While not conclusive of the question under discussion, yet it should be mentioned as persuasive that the same counsel that filed the petition on behalf of the defendant in error for the correction of the alleged erroneous assessment on the grounds sustained by the court, namely, that it was an assessment in solido against the bank and not against the stockholders, after the filing of its said petition, filed 40 other petitions in the name of certain stockholders of the said bank, out of an aggregate of 61, in the clerk's office of the court below, setting forth the grounds upon which they would each ask redress against the assessment complained of by said bank, on the ground that such assessments had been made against the stockholders, claiming that they had each been assessed with taxes by the City of Richmond at an illegal rate, viz. \$1.40 on the hundred dollars, whereas "the correct and legal tax should have been at a rate not exceeding thirty cents on the hundred dollars of such value," as will fully appear by a petition of one of said stockholders, which is in the following language:

"VIRGINIA:

In the Hustings Court of the City of Richmond.

Petition for Correction of Illegal and Erroneous Assessment of City Taxes for the Year 1915.

To the Hon. D. C. Richardson, Judge of said Court:

"The undersigned petitioner respectfully prays that the Court will correct an illegal and erroneous assessment of City Taxes for the year 1915, assessed against and collected from your petitioner by the City of Richmond, Virginia, on 60 shares of stock of the Merchants National Bank of Richmond, Virginia, at \$1.40 on the \$100 of the taxable value of said shares of \$39,959.40; whereas, the correct and legal tax should have been at a rate not exceeding 30 cents on the \$100 of said value; and that the Court will order the City of Richmond, or its Treasurer, to refund to the undersigned the sum of \$439.56, being the difference between the amount of the said City Taxes for the year 1915 illegally and erroneously assessed against and collected from the undersigned, as aforesaid, and the amount that should have been assessed against and collected from the undersigned.

"The grounds upon which the undersigned states that the above taxes assessed and collected, as aforesaid, were illegal and erroneous, are as follows:

(1) That a certain ordinance of the City of Richmond, approved April 9, 1915, providing that for the year 1915 the tax on bank capital, surplus and undivided profits should be one and four-tenths per centum of value, was illegal, since section 1040-a of the Code of Virginia expressly limited the City of Richmond to the same rate of taxation upon bank stock assessed by it as upon other moneyed capital in the hands of individuals residing in the said City, which rate for the year 1915 was fixed by law to a rate not exceeding 30 cents on the \$100 of value.

(2) That the said levy and assessment was also illegal and erroneous in that it violated that part of section 168 of the Constitution of Virginia, which requires that "all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"; whereas, all other moneyed capital was assessed by the City of Richmond for the year 1915 at a rate not exceeding 30 cents on the \$100 of value.

(3) That the said levy and assessment was also illegal and erroneous in that it violated that part of section 5219 of the Revised Statutes of the United States which provides that the taxation of shares of National Banking Associations shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

Respectfully,

LEGH R. PAGE,

Counsel for Petitioner.

"To the City of Richmond, Virginia:

Take notice that the foregoing petition will be filed in the Clerk's office of the Hustings Court of the City of Richmond, Virginia, on August 31, 1917.

(Sgd.)

MARIANNA A. CROUCH,

By Counsel.

LEGH R. PAGE,

Counsel for Petitioner."

If it be contended that the Court in this case cannot concern itself with other litigation, which the record does not and could not disclose, your petitioners insist that under the peculiar circumstances in the case, this Honorable Court should be informed of what has taken place since the entry of the final order herein of August 3rd, 1917, vitally concerning this litigation, and as authority for so doing, your petitioners refer to what was said by Burks, J., in the case of Redd vs. Supervisors, 72 Va. (31 G.) 695, 711. It was there said:

"Since the foregoing opinion was written it has come to my knowledge that the Governor of the Commonwealth has approved an act passed by the General Assembly authorizing the supervisors of Henry County, to carry out the wishes of the majority of the voters of Henry County, as expressed by the vote taken on the 11th day of September, 1875, and to assess and levy such annual tax as may be necessary to pay the subscription of one hundred thousand dollars, notwithstanding the limitations prescribed by the 62nd section of Chapter 61 of the Code.

"The conclusions which I have reached in this case are independent of the special act referred to, but it may be as well to say that if there were any defects or irregularities in the proceedings reviewed in this opinion, which might offset the subscription made by the supervisors they are cured by this legislation."

For the same reason given by the learned Judge in the above quotation your petitioner feels justified in bringing to the attention of this Honorable Court another far more important fact occurring since the rendition of the final judgment in this case. That fact consists of the adoption by the Council of the City of Richmond of a curative ordinance approved November 21, 1917, whereby the Council undertook to cure and validate any defects that had theretofore existed in the ordinances of the City of Richmond or in the actings and doings of the Commissioner of the Revenue of the City of Richmond in levying and assessing a tax upon shares of bank stock as authorized by section 1040-a of the Code of Virginia 1904, an official copy of which ordinance is herewith filed marked Exhibit "Y" and prayed to be read and considered as a part of this petition. The particular provision of said ordinance, so far as necessary to an understanding of this case, was embodied in section 3 (b) of said ordinance, which is in the following language:

"3 (b). The assessment and collection of the tax on shares of stock in banks, banking associations, trust and security companies shall be ascertained in the mode prescribed by State statute for the year in which such assessment is made, and the rate of tax upon such shares of stock so ascertained, shall, for the year 1915, be one and four-tenths per centum (1 4/10%) of the value of such shares of stock, and for the year 1916 and each subsequent year, shall be one and fifteen one-hundredths per centum (1 15/100%) of the value of such shares of stock. And the actings and doings of the Commissioner of the Revenue of the City of Richmond in receiving and filing as permanent records in his office the reports returned by the several banks, banking associations, trust and security companies doing business in this City for the years 1915, 1916 and 1917, made in pursuance of the Act of the General Assembly of Virginia, concerning Tax on Banks and Trust and Security Companies, in force on the date on which such reports were returned to the said Commissioner, and the actings and doings of the said Commissioner in extending, charging and assessing said taxes for said years in accordance with said reports, and in furnishing the principal officer of each bank, banking association, trust and security company, whose shares of stock are so

assessed in the name of individual stockholders, with copies of the assessment so made, are hereby declared to be an assessment against the stockholders, and not an assessment against the said banks, banking associations, and trust and security companies, and are hereby validated and confirmed and made of the same force and effect as if said Commissioner had entered the name of each of such stockholders upon the personal property book of the City of Richmond, and had on such book extended opposite his name and assessed such tax at the rate hereinbefore provided, and are hereby likewise confirmed and declared to be as valid and binding as if they, or like assessments and acts would be, if done under this ordinance. Any such stockholder or other person feeling himself aggrieved by the assessments hereby validated and confirmed may, within six months from the approval of this ordinance, apply to the Hustings Court of the City of Richmond for redress against such assessment in the mode prescribed by Sections 571 and 572 of the Code of Virginia 1904, and any act amendatory thereof. This subsection shall be applicable to all suits now pending or which may hereafter be brought, calling in question the validity of the assessment or levy of taxes on shares of stock in banks, banking associations, trust and security companies, as well as any alleged assessment against banks, banking associations, trust and security companies."

While it may be, with some show of reason contended that the above mentioned proceeding on behalf of one of the stockholders is itself a nullity, by reason of its not being an application to the Hustings Court, but, as the notice shows, was only filed in the clerk's office of that court on the last day on which a motion of this character would have been made, to be within the two years from the first day of September of the year in which such assessment was made, nevertheless it being made through the same counsel who represented the Merchants National Bank, this should be taken as an indication of the want of confidence of the learned counsel in the decision of the Hustings Court in this case.

In the next place your petitioner contends that the action of the court, in undertaking, as it did by the order of August 3rd, 1917, "to ascertain the aggregate amount of the taxes due by the stockholders of the bank for said year to be \$3,961.92", and to order that, "said amount of \$3,961.92 be deducted from the sum of \$18,489.20 paid by petitioner under said illegal and erroneous assessment and that the same be treated as payment in full of said tax for the year 1915 due the said City of Richmond under said corrected assessment thereof, and that petitioner do recover of the said City of Richmond the balance of the sum so illegally paid by it, remaining after said deduction, to wit, the sum of \$14,527.28, and that the same be refunded to it by the Treasurer of said City of Richmond, but without interest."

If, as held by the court, the assessment and levy of the tax of \$18,489.20 was against the bank in solido, then, unquestionably, it was the duty of the court to declare said assessment and levy invalid under the several statutes of this State concerning the assessment of

shares of stock in banks, as well as under section 5219 of the Revised Statutes of the United States, and order a refund of the amount paid by the Bank, but in such situation the court had no jurisdiction to undertake, in the proceedings before it, to assess any taxes whatever either upon the Bank itself or upon the shareholders in the Bank who were not parties to the proceedings. It goes without saying that consent could not give jurisdiction to such an action as was taken by the court in assessing a tax upon the stockholders.

It is true that in *Commonwealth vs. Schmeltz*, 114 Va. 361, was held:

"A tax-payer who comes into court, under the provisions of the statute of this State, to be levied from paying more taxes than he claims he ought to pay renders himself liable in that proceeding to pay all taxes with which he is chargeable in that jurisdiction upon a correct assessment of his property, and to this end the court may examine into and do all that the commissioner of the revenue is required to do under the provisions of sections 508 and 509 of the Code."

The basal fact on which the above ruling was made is that the party asking redress as a tax-payer, is in fact such upon whom tax might lawfully be assessed and was chargeable in that jurisdiction upon a correct assessment of his property. No such basal fact exists here, for there is no authority under the law of the land to assess a tax against a bank, but, on the contrary, both State and Federal laws expressly prohibit the assessment and levy of such taxes.

This holding and reasoning was re-affirmed in *Commonwealth vs. Schmeltz*, 116 Va. 62. There it will be seen that the court went no further than in the first case stated, and carefully guarded the granting of the relief of the character here attempted to be granted by the court, holding that the persons against whom the corrected assessment is made must be "litigants who are all before the court."

It is therefore submitted with the greatest confidence that the action of the Commissioner of the Revenue in making the entry that he did make upon the personal property book, claimed by the defendants in error to be an assessment against the bank in solidum was ultra vires, and, as a consequence, was a nullity, and is in no way binding upon the City of Richmond.

But suppose, for the sake of the argument, that the original assessment for the year 1915 of City taxes on shares of bank stock was defective, and for that reason not enforceable, yet said defect was absolutely cured by the provisions of section 3 (b) of an ordinance approved November 21, 1917, made Exhibit "Y", with this petition

"That acts to cure defects in tax proceedings previously had may be passed under some circumstances has been affirmed in a great number of cases." (First Cooley on Taxation, p. 510), and again on page 517 the same learned author says: "The general rule has often been declared that the legislature may validate retrospectively the proceedings which they might have authorized in advance. Therefore, if any directions of the statute fail of observance, which are no

so far of the essence of the thing to be done that they must be provided for in any statute on the subject, the legislature may retrospectively cure the defect."

Mattingly vs. District of Columbia, 97 U. S. 687, is much in point. This was a suit brought to annul an assessment made by the Board of Public Works of the District of Columbia without authority of law, which action was subsequently ratified by an act of Congress. It was there said at page 690:

"If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority, according to the maxim *Omnis ratihabitio retro trahitur et mandato priori equiparatur*." Citing what was said by Judge Cooley in his work on *Constitutional Limitations* (4th Ed.), at page 643.

Again at page 692, it was said by the Supreme Court:

"We are of opinion, therefore, that the assessments have been ratified by Congress. If there were errors in the manner of making them, or in the amount of the charges provision was made for the correction of errors. If the church and school properties should not have been exempted, and consequently the amount charged upon the complainants' properties was erroneously increased, the commissioners were empowered to correct the wrong.

"It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question.

See also *Sturges vs. Carter*, 114 U. S. 511.

In *Williams vs. Albany*, 122 U. S. 154, it was held that the mode in which property shall be assessed, by whom and when the assessment shall be made, and other details of the assessment and collection are matters within the legislative discretion, and it is within the power authorizing the tax to cure omissions or defective performance of such requirements that may have been made concerning the same, subject only to one provision, viz: that intervening rights are not impaired. Special attention is called to the language of Mr. Justice Field, found on pages 164-166, inclusive. This case and the one under consideration here are so analogous as to be almost conclusive of the question now under discussion, and in addition it disposes of the contention that retroactive laws are unconstitutional, though they contain provisions authorizing any person aggrieved by the curative act to appear and show cause against its validity.

On this last point see Cooley on *Constitutional Limitations*, pages 466, 467.

See also *Spencer vs. Merchant*, 125 U. S. 345, 353, 355.

No better discussion of the question under consideration can in the judgment of your petitioner be found than in the opinion of Keith, P., in *Whitlock vs. Hawkins*, 105 Va. 242. In that case there was much insistence that the validating act passed by the Legislature of Virginia had a retrospective effect, and was therefore unconstitutional. After a review of the authorities on this subject, the learned President said at page 252: "The authorities we have cited abundantly show that such laws (retroactive laws) are not repugnant to the Constitution of the United States."

That after the passage of the Act of December 10, 1903, which act had been enrolled and published as one of the acts of the General Assembly of Virginia, and after the Judges of the Commonwealth acting thereunder had appointed reassessors of real estate, and after such reassessors had qualified in court, and had proceeded to discharge their duties under the aforesaid act, and had reported reassessments made by them to the proper officer, and after taxes had been extended upon such reassessments by the Commissioner of the Revenue for the year 1906, the Legislature adopted a validating act which was in the following language: "All assessments and all other acts of every kind which have been made or done in compliance with the terms of Chapter 388 of the Acts of Assembly, 1902-3-4, approved December 10, 1903, are hereby confirmed and declared to be as valid and binding as they or like assessments and acts would be if done under this act."

At pages 254-5, the learned President uses the following language:

"Does that curative act violate the Constitution of the United States or of the State? It is not *ex post facto* in its nature; it does not impair the obligation of a contract; it divests no vested right. It is the duty of every citizen, in return for the protection he receives of his person and property, to bear his just proportion of the burden of taxation. That burden cannot be distributed without an assessment of the property upon which it is to be imposed. That the Legislature had the authority and was charged with the duty to pass a proper assessment law is beyond dispute. Every intendment and presumption which can apply with respect to the constitutionality of an act of the Legislature bears with full force upon the act under consideration. We have seen that it is not repugnant to the Constitution of the United States, provided it meets the requirement of the Fourteenth Amendment with respect to due process of law, and the similar provision in the State Constitution, with respect to which subjects we will deal later on. We have seen that there is no express inhibition in the State Constitution upon the passage of retrospective laws; and can it be said, in the language of Judge Staples, in *Town of Danville vs. Pace*, *supra*, that 'it involves so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest its execution'? That admirable statement of the law is followed by the impressive caution, that 'when we depart from the express limitations of the Constitution, and venture into the vast and unexplored region of implied restrictions, the legislative usurpation ought to be

very clear, palpable and oppressive to justify the interposition of the judiciary.'"

The learned President cites and approves of the case of *Cowgill vs. Long*, 15 Ill. 202, saying concerning that decision: "And the law was upheld, though it clearly gave validity to that which was, in the absence of the curative statute, an utter nullity." Citing *Rogers vs. Keokuk*, 3 Wall. 74, and *Thompson vs. Lee Co.*, 3 Wall. 177. See also his approval of the following cases:

Iowa vs. Soper, 39 Iowa 112, at page 361, where it was held that, "Taxes levied without authority of law may be rendered legal and valid by subsequent legislative enactment," and "A legislative act which legalizes a tax before invalid and uncollectible, does not impair any vested right of the taxpayer."

Boardman vs. Beckwith, 18 Iowa 292, holds that: "This act, although it was retrospective and legalized taxes which were levied without any shadow of legal authority, and the levies were therefore utterly void, was held constitutional and operative."

In his opinion the learned President considers the question of due process of law as affecting curative acts, and held on pages 255-6, that "a provision in a statute 'for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question, what proportion of the tax shall be assessed upon his land,' fulfils all the essentials of due process of law," citing several cases from the Supreme Court of the United States, concluding the discussion on this subject in the following language:

"Time is not, in this case, of the essence of the transaction, nor is it anywhere in the act made a condition of its validity. The assessments should be returned in time to give all persons affected by them opportunity to make objection and obtain redress; but when this has been done we think that every necessary condition has been satisfied and that the provision relied upon is directory and not mandatory in its operation."

Numerous other authorities on this subject, fully sustaining those cited, may be cited, but it is deemed unnecessary so to do.

(3) It may be admitted, for the sake of the argument only, that the irregularity complained of as to the assessment of City taxes for the year 1915, would have been reasonable if promptly objected to, yet, in view of the long acquiescence of the plaintiff, as well as other banks of the City likewise assessed, of which the court will take judicial notice, it is precluded, at this late day, of the right to claim that the assessment of the taxes was an assessment against the bank, in violation of law, and not an assessment against the stockholders.

So much has been said concerning the peculiar circumstances attending the assessment of the taxes complained of that it is only necessary to cite the authorities bearing upon this subject. Many of them are quoted in note 1, page 1515 of *Cooley on Taxation*, Volume 2. It is there said:

"Such a case would exist if one, in respect of some interest of his own, should petition for or otherwise actively encourage the levy of the tax or assessment of which subsequently he makes complaint."

Among the cases cited to sustain the text is *McGillin vs. Chase*, 39 Neb. 422, where it was held that, "One who has listed property for taxation as his own instead of as belonging to the corporation of which he was a manager, cannot have collection against himself restrained."

Again in *Scholefield vs. West*, 44 La. An. 277, it was held that "Although property is assessed in the name of one not the owner, yet if the latter pays the tax due thereon he will be estopped from disputing the correctness of the assessment."

In *Mowry vs. Slatersville Mills*, 20 R. I. 94, it was held that, "Where a corporation has returned to the assessors an account of its realty and personalty, the valuation whereof on the assessment roll does not exceed the amount so returned, it is estopped from seeking to avoid the roll on the ground that such roll does not show that the assessment was limited to the kinds of personalty specified by the statute."

Haymaker vs. Com. Bank, 95 Wis. 359, is much in point. It was there held that a receiver cannot resist payment of a tax assessed against a bank "which is based on a property statement made by its Cashier to the assessor in good faith before its insolvency, because the bank is estopped by such statement even though it had, in fact, no property liable to taxation—the property listed being its own bank stock which should have been assessed to the stockholders—and the receiver is also estopped thereby."

In the *Wingfield Bank vs. Nipp*, 47 Kan. 744, it was held that a bank could not perpetually enjoin the collection of taxes levied upon the stock returned by it upon the ground that the capital stock in the bank is held by individual stockholders, the bank having made a return to the proper assessor, verified by the oath of its President showing that the bank is the owner of stock in a company or corporation of the actual value of \$22,000, and upon such return taxes have been assessed and levied against the bank itself.

In *Hilton vs. Fonda*, 86 N. Y. 339, 340, it was held that a person having knowledge of the course prescribed by law to an official, cannot look on and see the officer innocently depart from the prescribed course, and by silence, acts, words and seeming acquiescence encourage him in his departure, and then maintain an action against him in his personal capacity therefor; such conduct would be held a waiver of the right of the party to have an exact compliance with the statute in his favor.

In *Ives vs. Town of North Canaan*, 33 Conn. 402, it was held that a taxpayer was estopped from denying the legality of an assessment if he had, by his conduct, authorized or induced the assessors to put the property on the assessment roll of the town.

In *Sexton vs. Pepper*, 28 Hun. 31, it was held that although the assessors had no right to place the name of the plaintiff upon the rolls, yet as such assessment had continued for many years, and had

never been reversed or set aside and as the tax had been regularly paid during that period, the plaintiff is estopped from maintaining an action to recover the tax.

In the light of these authorities it is insisted that the doctrine of *stoppel* operates to conclude the right of the plaintiff to call in question the correctness of the report made by it or the assessment and collection of the tax thereunder, after it had without protest or objection from year to year paid the assessment based on such reports.

Second. It was error for the court to fix thirty cents on the hundred dollars of value as the maximum rate to be levied by the City of Richmond on shares of bank stock.

Your petitioner is advised and therefore charges that under the necessary construction given to the "State Tax Segregation Act" in the opinion of this Honorable Court delivered by Kelley, J., in the case of *City of Richmond vs. Drewry-Hughes Co.*, 15 Va. Ap. 161, S. C. 120 Va. —, it necessarily follows that the court committed error.

The particular language to sustain this contention found on page 164 of Va. Ap., is as follows:

"The words 'as prescribed by law' were not apt and natural words to convey the idea that local taxation on merchants' capital was to be limited to the rate fixed in the act. This language, in its inception, was a part of a proposed new law, and in its ordinary, natural and usual sense would be understood to refer to something outside of the proposed law, either already a part of the existing statute law or thereafter to be enacted into law by competent authority. If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named in that particular act, undoubtedly he would have used the words, 'as prescribed by this act' or their equivalent, instead of 'as prescribed by law.'

"If this be not true, then it would follow that 'shares of stock of banks' could only be taxed locally at the thirty cent rate, for, as we think, it cannot be plausibly contended that the words 'as prescribed by law,' when applied in the act to merchants' capital, have any other or different meaning than the words 'as provided by law' when applied therein to bank stock. The necessary result of the decision of this court in *Tresnon vs. Board of Supervisors* is that the local taxation of bank stock is not controlled by the terms of the segregation act."

The court is so familiar with the questions involved in that case that your petitioner deems further elaboration thereon unnecessary.

Third. It was error for the court, after having determined that the assessment made by the City of Richmond and complained of in the petition was an assessment in *solido* against the Merchants' National Bank and not against the stockholders in said Bank, to undertake to proceed any further on the application before it, except to order the refund to the Merchants National Bank of the amount paid the City of Richmond in satisfaction of the assessment.

On this particular point the record shows that the order of the court is as follows:

"On the 1st day of August, 1917, the court delivered its opinion in writing (which is hereby made a part of the Record) declaring that the levy, assessment and collection of the City of Richmond of the tax for the year 1915, in the petition complained of, is illegal and erroneous (1) because said tax, instead of being levied and assessed against the shareholders of petitioner, upon the value of their shares, ascertained in the manner prescribed by law, was levied and assessed after the ordinance of said City approved April 9th, 1915, had become operative and was in force, and was levied and assessed by and pursuant to the express terms of said ordinance, and as so levied and assessed was a tax in solido directly against petitioner in itself upon its capital, surplus and undivided profits, less the assessed value of its real estate, and other deductions allowed by law, contrary to the express prohibition contained in the Revenue Bill of the State of Virginia then in force, and (2) because instead of being at the legal rate of 30 cents on each \$100 of the assessed value of the shares of Petitioner, said tax was levied, assessed and collected at the illegal rate of \$1.40 on each \$100 of such value.

"And it is accordingly so ordered; and the court proceeding by consent of all parties by counsel nunc pro tunc to correct the levy and assessment of said tax of the City of Richmond for the year 1915 so as to conform to the law then in force as declared in its opinion, doth ascertain the aggregate amount of the taxes due by the shareholders of petitioner for said year to be \$3,961.92; and it is hereby ordered that said amount of \$3,961.92 be deducted from the sum of \$18,489.20 paid by petitioner under said illegal and erroneous assessment and that the same be treated as payment in full of said tax for the year 1915 due the said City of Richmond under said corrected assessment thereof, and that petitioner do recover of said City of Richmond the balance of the sum so illegally paid by it remaining after said deduction, to-wit, the sum of \$14,527.28, and that the same be refunded to it by the Treasurer of said City of Richmond, but without interest; and it is further ordered that petitioner do recover of the said City of Richmond its cost in this behalf expended" (M. R., 20-21).

To sustain this assignment of error your petitioner relies upon the following considerations:

(1) The jurisdiction in this case was invoked and can only be exercised either to grant or deny the relief provided for—that is either to correct an erroneous assessment on the ground alleged in the petition or to deny the relief. When the court had determined, as it did by the order quoted above, that the taxes levied and assessed by the City of Richmond, was a tax in solido against the bank upon its capital, surplus and undivided profits, less the assessed value of its real estate and other deductions allowed by law, contrary to the express prohibition contained in the Revenue Bill of the State of Virginia then in force, there was but one other thing that the court

could do under the statute giving jurisdiction and that was to order a refund of the tax erroneously assessed and paid, and, as a consequence, the subsequent order, by consent of parties, to the refunding of the sum thus found to have been erroneously paid and directing an assessment at the rate of thirty cents was an act *coram non judice*.

The doctrine of *coram non judice* is tersely stated in Note 9, page 976 of 9 Cyc., where it is said:

"Proceeding *Coram non Judice*.—When a suit is brought and determined in a court which has no jurisdiction in the matter, it is then said to be *coram non judice*, and the judgment is void. Black L. Dict. See also *Little vs. Dyer*, 138 Ill. 272, 281; *Larue vs. Des Lauriers*, 5 Can. Sup. Ct. 91, 128; *Graham vs. McArthur*, 25 U. C. Q. B. 478, 484; *Wragg vs. Garvis*, 5 U. C. Q. B. O. S. 290, 292; and *certiorari*, 6 Cyc. 800."

It goes without saying that in order for the judgment to be valid the court must have jurisdiction of both the subject matter and of the parties. Here neither of these essentials existed. The subject matter, viz., the taxation of the bank itself, which rendered the assessment concededly void, was the only subject matter before the court, nor did the court have jurisdiction of the parties, for the shareholders of the bank were not parties to the proceeding and the courts, Federal and State, had both recognized that the taxation of banks as a distinct entity from the taxation of the shareholders, which may be dealt with by the taxing power, subject, of course, to the limitations placed thereon by the Federal and State statutes on the subject, which have been hereinbefore discussed.

In *Owensboro National Bank vs. City of Owensboro*, 173 U. S. 664, among other pertinent holdings, is the following:

"A tax on a corporation or its property is not the legal equivalent of a tax on the stock, in the names of the stockholders."

In *City of New Orleans vs. Citizens Bank of Louisiana*, 167 U. S. 371, 402, Chief Justice White uses the following language:

"Moreover, in the *Boumy* case the Supreme Court of Louisiana held that the bank was without authority to champion the rights of its stockholders, and the bill in this case is filed in behalf of the bank alone, and predicated solely upon the theory that the bank was entitled to attack the tax because of the absolute duty imposed upon it to pay. The decree below, therefore, which held that the stockholder could not be taxed because of the contract right of the bank conflicted with the settled rules of law, and accorded the complainant a right to which it was not entitled, although under the authority of the thing adjudged the non-liability of the bank to taxation as to certain objects of taxation be fully established."

In *Windsor v. McVeigh*, 93 U. S. 274, it was held:

"A sentence of a court, pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial

determination of his rights, and is not entitled to respect in any other tribunal."

The leading case in Virginia is *Nulton vs. Isaacs*, 71 Va. (33 Grat.) 726, 740.

Other pertinent cases are cited in *St. Lawrence, etc., Co. vs. Holt*, 51 W. Va. 352; S. C. 41 S. E. 352.

If it be urged, in answer to this contention, that the order complained of was a consent order, it is sufficient to say that consent cannot give jurisdiction to a court that is without jurisdiction. The authorities on this point are too familiar to be cited.

Besides, by an order of the Hustings Court of the City of Richmond entered on the 25th day of March, 1918, forty (40) out of a total of sixty-one (61) stockholders of the Merchants National Bank who had filed petitions asking a correction of the assessment of taxes on their shares of stock in said bank by reason of the rate being \$1.40 instead of 30 cents on the hundred dollars of value, because such petitions had only been filed in the Clerk's Office of the said court and not presented to the court in term time, sought and obtained leave from the said court to withdraw said petitions, on the ground that this Honorable Court in the cases of *T. L. Moore vs. County of Henrico* and *T. L. Moore vs. County of Henrico et als.*, had, by its orders entered on the 13th day of March, 1918, determined that the mere filing of petitions in the Clerk's Office of the court did not constitute an application to the court for redress against an erroneous assessment, but that such application could only be legally made to the court in term within the time prescribed by the statute. (See orders made by this Honorable Court in said cases on Wednesday, the 13th day of March, 1918, and Editorial Comment upon the action of the court appearing in Volume 4, *Virginia Law Register* (N. S.), pp. 47-51).

(2) The record will show that immediately after the entry of the alleged consent order that your petitioner, by its attorneys, "moved the court to set aside said judgment on the ground that the same was contrary to the law and facts, and to grant it a rehearing, which motion the court overruled, and thereupon the City of Richmond by its attorneys, excepted to the action of the court in that respect."

It thus appears that even though the City of Richmond, by its attorneys, had consented to the attempted correction of the erroneous assessment against the bank in the manner stated in the said order, namely, apportioning to the City a tax of thirty cents on the hundred dollars on the value of the shares of stock, yet this latter motion made by the City necessarily had the effect of withdrawing said consent, if ever legally made, and restoring the City of Richmond to its right to stand upon its rights as disclosed by the record, without reference to such consent. (See Bill of Exceptions No. 3, M. R. 77.)

The great importance of the principles involved in this litigation seems entirely sufficient to justify review by this Honorable Court, but in addition, it seems to your petitioner, not improper to state that the pecuniary interests involved are so unusually large that at-

tion should be called to that fact. At the time of the trial of this case, and within thirty days thereafter, there had been instituted and were pending in the Hustings Court of the City of Richmond more than 2,400 suits involving the questions raised in the foregoing petition, and in amount involving a pecuniary interest totaling \$202,259.60, all of which sums had been paid into the Treasury of the City of Richmond during the year 1915, in accordance with the provisions of the statutes and ordinances in force for that year, and which had been, during that year, considered as a part of the revenues of the City applicable to its current expenses, as provided by section 69 of the Charter of the City of Richmond, yet if the contention made by the defendant in error prevails the City of Richmond may be obliged to refund to the banks or to the stockholders of the several banks of the City this large sum, and if not barred by the statute of limitations at the conclusion of the litigation, like redress and the refund of a like sum compelled for the years 1916, 1917 and 1918, except that for these years the rate would be \$1.15 instead of \$1.40.

Wherefore your petitioner prays that a writ of error and supersedeas to the said order of August 3, 1917, may be granted and that the said order may be reversed and annulled and that a retrial of the said case — directed by this Honorable Court, and that no bond be required of your petitioner as provided by statute.

CITY OF RICHMOND,
By COUNSEL.

H. R. POLLARD,
City Attorney.

I, Henry R. Pollard, an attorney at law practising in the Supreme Court of Appeals of Virginia, do certify that in my opinion the judgment complained of in the foregoing petition should be reviewed and reversed by this Honorable Court.

Given under my hand this 22nd day of May, 1918.

HENRY R. POLLARD.

Received May 22, 1918.

Writ of error allowed and supersedeas awarded. No bond.
ROBERT R. PRENTIS.

Received May 23, 1918.

H. S. J.

EXHIBIT "Y."

An Ordinance.

(Approved November 21st, 1917.)

To Amend and Re-ordain Section 3 of Chapter 15, Richmond City Code, 1910, Concerning the Levying of Taxes, as Amended and Re-ordained by the Ordinance Approved April 9, 1915, and the Ordinances Approved June 17, 1916, June 12, 1917, and October 16, 1917, and to Validate Certain Assessments and Levies Made, and Other Acts Done Under the Aforesaid Ordinances.

Be it ordained by the Council of the City of Richmond:

1. That Section 3 of Chapter 15, Richmond City Code, 1910, concerning the Levying of Taxes, as amended by the ordinance approved April 9, 1915, and further amended by the ordinances approved June 17, 1916, June 12, 1917, and October 16, 1917, be amended and re-ordained so as to read as follows:

3 (a) That all property not mentioned in the foregoing section, subject to taxation by the City of Richmond, shall be classified for purposes of taxation and taxed as follows:

Class 1. Bonds not exempt by law, notes and other evidences of debt, thirty cents on each \$100 of values. 30c.

Class 2. Capital of persons, firms or corporations employed in any trade or business, other than the business of banking, trust, or security, thirty cents on each \$100 of values. 30c.

Provided that if such capital includes the value of real estate belonging to such persons, firms or corporations, the value of said real estate shall be deducted in reporting the capital employed in business, and shall be listed and taxed as real estate; except that the capital of merchants shall not be included under this head, but merchants shall be taxed as provided in Section 28 of this chapter.

Class 3. The value of the principal or personal estate and credits, other than money under the control of the court, receivers or commissioners, or in the hands or under the control of an executor, administrator, guardian, trustee, or other fiduciary, thirty cents on each \$100 of values. . . 30c.

Class 4. All money other than that used or employed in any trade or business, or in the possession of the owner, or under the control of an agent, not on deposit with any bank or banking association, trust or security company, thirty cents on each \$100 of values. 30c.

Class 5. All shares of stock of corporations or joint stock companies in the hands of persons, firms or corporations, other than shares of capital stock of corporations or joint stock companies, whose tax is paid by officers or principal agents of corporations, the principal offices of which are located within this city, thirty cents on each \$100 of values. 30c.

Class 6. Bonds of counties, cities and towns, or other political sub-divisions of the State of Virginia, or other States, except such as are exempt by law, thirty cents on each \$100 of values. 30c.

3 (b) The assessment and collection of the tax on shares of stock in banks, banking associations, trust and security companies shall be ascertained in the mode prescribed by State statute for the year in which such assessment is made, and the rate of tax upon such shares of stock so ascertained, shall, for the year 1915, be one and four-tenths per centum ($1\frac{4}{10}\%$) of the value of such shares of stock, and for the year 1916 and each subsequent year, shall be one and fifteen one-hundredths per centum ($1\frac{15}{100}\%$) of the value of such shares of stock. And the actings and doings of the Commissioner of the Revenue of the City of Richmond in receiving and filing as permanent records in his office the reports returned by the several banks, banking associations, trust and security companies doing business in this city for the years 1915, 1916 and 1917, made in pursuance of the Act of the General Assembly of Virginia, concerning Tax on Banks and Trust and Security Companies, in force on the date on which such reports were returned to the said Commissioner, and the actings and doings of the said Commissioner in extending, charging and assessing said taxes for said years in accordance with said reports, and in furnishing the principal officer of each bank, banking association, trust and security company, whose shares of stock are so assessed in the name of individual stockholders, with copies of the assessment so made are hereby declared to be an assessment against the stockholders and not an assessment against the said banks, banking associations, and trust and security companies, and are hereby validated and confirmed and made of the same force and effect as if said Commissioner had entered the name of each of such stockholders upon the personal property book of the City of Richmond, and had on such book extended opposite his name and assessed such tax at the rate hereinbefore provided, and are hereby likewise confirmed and declared to be as valid and binding as if they, or like assessments and acts would be, if done under this ordinance. Any such stockholder or other person feeling himself aggrieved by the assessments hereby validated and confirmed may, within six months from the approval of this ordinance, apply to the Hustings Court of the City of Richmond for redress against such assessment in the mode prescribed by Sections 571 and 572 of the Code of Virginia, 1901, and any act amendatory thereof. This sub-section shall be applicable to all suits now pending or which may hereafter be brought calling in question the validity of

the assessment or levy of taxes on shares of stock in banks, banking associations, trust and security companies, as well as any alleged assessment against banks, banking associations, trust and security companies.

3 (c) Monied capital in the hands of individuals or under their control, used or employed in the business of banking, or used or controlled by them in the business of trust or security shall be, for the year 1915, taxed at the rate of one and four-tenths per centum ($1\frac{4}{10}\%$) on the amount of such capital, and shall be, for the year 1916 and each subsequent year, taxed at the rate — one and fifteen one-hundredths per centum ($1\frac{15}{100}\%$) on the amount of such capital, but shall not be otherwise taxed as capital.

3 (d) Any property mentioned in the foregoing sub-sections (b) and (c), which for any reason shall not have been legally assessed for the years mentioned therein, at the rate thereby prescribed, shall be, by the Commissioner of the Revenue of the City of Richmond, assessed for said years at the rate thereby prescribed as "omitted taxes," and the taxes so assessed and levied shall be collected as prescribed by law for the collection of such taxes.

2. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

3. This ordinance shall be in force from its passage.

A True Copy—Teste:

ALF. W. McDOWELL,
City Clerk.

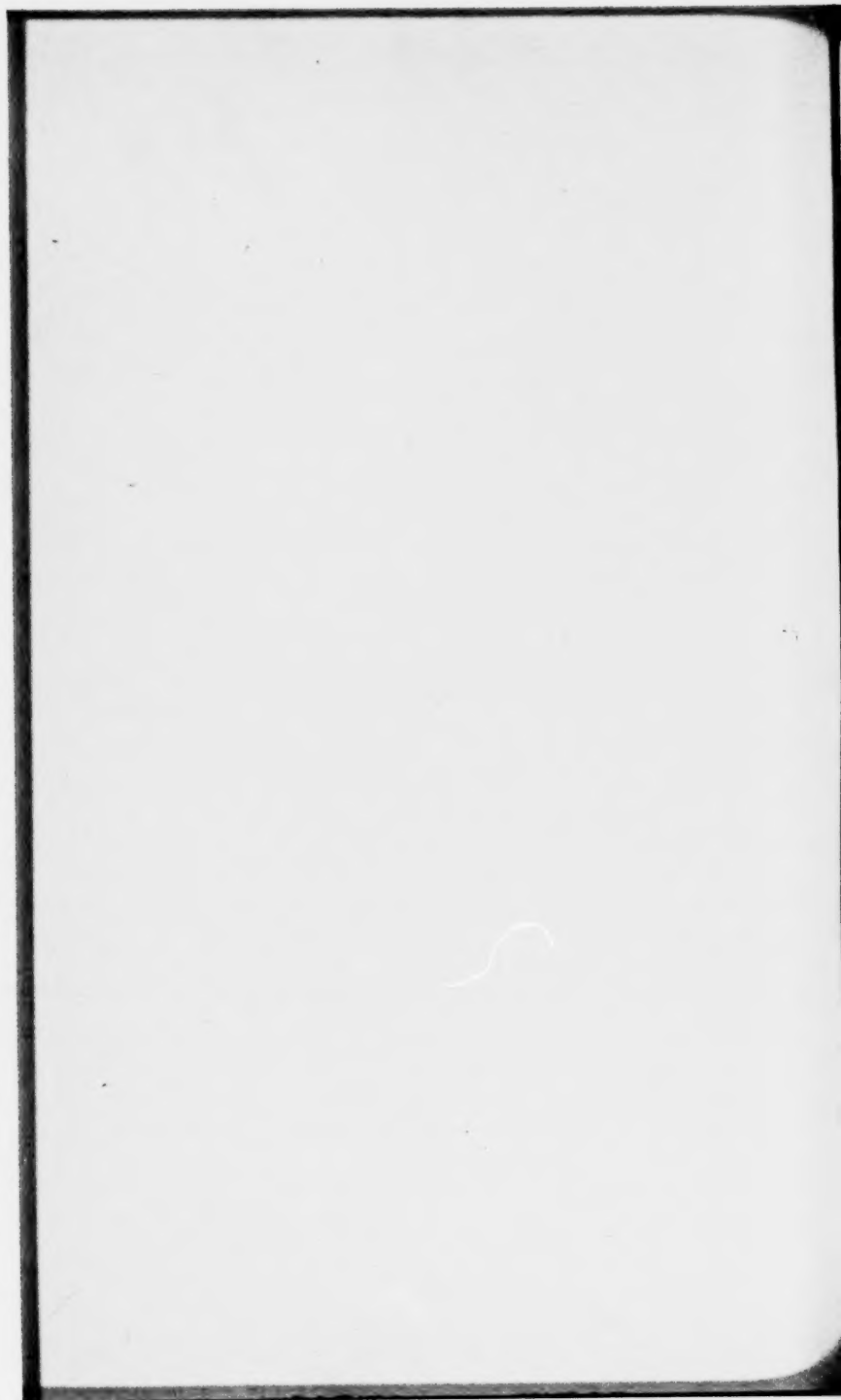
[Endorsed:] File No. 27,465. Supreme Court U. S. October Term, 1919. Term No. 710. The Merchants National Bank of Richmond, Va., pl'ff in error, vs. The City of Richmond. Stipulation of counsel and addition to record. Filed March 13, 1920.

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IN THE
SUPREME COURT OF THE UNITED STATES

MERCHANTS NATIONAL BANK OF RICHMOND, VA.,
PETITIONER,

against

THE CITY OF RICHMOND, VIRGINIA,
RESPONDENT.

To the Honorable the Supreme Court of the United States:

The petition of the Merchants National Bank of Richmond, Virginia, shows to this Honorable Court:

These proceedings were commenced in the Hustings Court of the City of Richmond, Virginia, on February 5, 1917, when the petitioner filed in that court an application under section 571 of the Code of Virginia, seeking to be relieved of an erroneous assessment of taxes assessed by the City of Richmond for the year 1915 upon the capital, surplus and undivided profits of the petitioner, a national banking association, less the assessed value of its real estate. The facts of the case are uncontroverted; the tax complained of was assessed at the rate of \$1.40 on each \$100 of the value of petitioner's capital, surplus and undivided profits, less the assessed value of its real estate. For the same year the Commonwealth levied, assessed and collected from the petitioner a State tax at the rate of 35 cents on each \$100 of the actual value of the petitioner's shares of stock. And,

for the same year, the said city levied, assessed and collected a tax at the rate of only 30 cents on the \$100 actual value of all other intangible property, including all other moneyed capital in the hands of individual citizens of the said city. Upon this last-mentioned class of property, the Commonwealth of Virginia assessed, levied and collected a tax at the rate of 65 cents on each \$100 of the actual value thereof.

The contention of the petitioner was:

1. That the tax at the rate of \$1.40 on each \$100 of the value of the petitioner's capital was illegal and void because it was levied and assessed directly against the petitioner upon its capital, surplus and undivided profits contrary to Section 18 of the Tax Laws of the Commonwealth of Virginia, in force at that time (a copy of which is filed herewith, marked "Exhibit C," and prayed to be read as a part of this petition), as well as contrary to the Constitution and laws of the United States of America.

2. That no tax at a higher rate than 30 cents on each \$100 actual value of the petitioner's stock, to be ascertained as prescribed by Section 18 of the Tax Laws of the Commonwealth of Virginia, was authorized by the said ordinance of the City of Richmond; and,

3. That the said tax of \$1.40, assessed and imposed by the said City of Richmond, aside from its being assessed upon petitioner's capital, surplus and undivided profits, was illegal and void because when taken in connection with the tax imposed that year by the Commonwealth of Virginia at the rate of 35 cents on each \$100 actual value of petitioner's shares of stock, it was at a higher rate than the tax imposed upon other moneyed capital in the hands of individual citizens of said city and State.

The original proceedings resulted in an order and judgment of the Hustings Court of the City of Richmond, en-

tered on the 3rd day of August, 1917, relieving the petitioner of the amount of taxes complained of, to-wit: \$18,489.20, and directing that the said assessment be corrected so as to conform to law, and that a tax at the rate of 30 cents on each \$100 be assessed against the shareholders of the petitioner upon the actual value of their shares of stock, this being the rate assessed by the said City for the said year upon other moneyed capital in the hands of individuals, and being the rate levied by the ordinance of the said city upon all shares of stock taxable by the said City. The court further ordered that the petitioner pay such taxes for its shareholders by crediting the same upon the amount of taxes erroneously paid by the petitioner, and that the difference, to-wit: \$14,529.28, be refunded to the petitioner by the respondent.

Thereafter, by a writ of error granted to the said City of Richmond by the Supreme Court of Appeals of Virginia, under date of May 23, 1918, the cause was brought before the said Supreme Court of Appeals of Virginia for review, and was thereafter duly heard and determined by a judgment of reversal, entered by the said court on March 13, 1919, by which judgment the said cause was remanded to the Hustings Court of the City of Richmond for further proceedings to be had therein in conformity with the views expressed in the written opinion of the court, a copy of which opinion is annexed hereto as "Exhibit B." Thereupon, the said Hustings Court of the said City of Richmond, on April 19, 1919, entered a final order in the cause, in obedience to the said order of the said Supreme Court of Appeals of Virginia, setting aside and annulling the judgment and order of the said Hustings Court entered on the 3rd day of August, 1917, and the said court, being of opinion that nothing further remained to be done, ordered that the application of the plaintiff be rejected, and the correction of the erroneous assessment complained of in the petition be refused and that the proceedings be dismissed.

Thereafter, on the 25th day of November, 1919, the Supreme Court of Appeals of Virginia entered its final order

in this cause by which it refused a writ of error and supersedeas to the said judgment rendered by the said Hustings Court on the 19th day of April, 1919, the effect of which, as stated therein, was to affirm the said judgment of the Hustings Court of the City of Richmond. The certified copy of the entire record in this case in the Supreme Court of Appeals of Virginia is hereby furnished attached to and made a part of this application and marked Exhibit A, in compliance with Rule 37 of this Honorable Court. Your petitioner is advised and verily believes that the said judgment of the Supreme Court of Appeals of Virginia in the said cause is erroneous, and that this Honorable Court should require the said cause to be certified before it for review and determination, in conformity with the provisions of section 240 of the Judicial Code of the United States, the said judgment being the final judgment of the highest court of the Commonwealth of Virginia.

The petitioner further shows:

That the assessment and levy involved in this case was made by the Commissioner of the Revenue of the City of Richmond, Virginia, acting under color of authority of an ordinance of the City of Richmond, Virginia, approved April 9, 1915, which reads as follows:

"AN ORDINANCE
(Approved April 9, 1915.)

To amend and re-ordain Sections 2 and 3 of Chapter 15, Richmond City Code, 1910, concerning the levying of taxes.

Be it ordained by the Council of the City of Richmond:

1. That sections 2 and 3 of Chapter 15, Richmond City Code, 1910, be amended and re-ordained so as to read as follows:

2. On all real estate, tangible personal property and rolling stock of railways, other than steam roads,

not exempted from taxation, one and sixty-five one-hundredths per centum of value.

3. On all intangible personal property, *including bonds and stocks*, three-tenths per centum of value; on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital and surplus and undivided profits, one and fifteen-hundredths per centum of value, provided that for the year 1915 the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value; on capital employed in business, not otherwise taxed as intangible personal property, one and four-tenths per centum of value. The taxes upon such shares of stock in any bank, located and doing business in the city, shall be assessed and collected in accordance with the provisions of the Acts of General Assembly of Virginia of 1915.

2. This ordinance shall be in force from its passage."

At the outset of the proceedings in the Hustings Court of the City of Richmond, your petitioner raised the Federal question involved in this application, to-wit:

1. That the assessment and levy of the tax sought to be imposed by section 3 of the said ordinance at the rate of \$1.40 on each \$100 of petitioner's capital, surplus and undivided profits less the assessed value of real estate included in the said capital, surplus and undivided profits was repugnant to the Constitution and laws of the United States of America, and especially to section 5219 of the Revised Statutes of the United States, as this tax was a tax assessed directly against your petitioner *in solido* upon its capital, surplus and undivided profits; that your petitioner, being a national banking association, was an instrumentality of the Federal Government, and that, as such, no tax could be imposed upon it under the authority of any State, save to the extent of the permissive legislation of the Congress of the United States; that the Congress, by section 5219 of the re-

vised statutes of the United States had permitted taxes to be assessed under authority of the State against your petitioner only upon its real estate; that the Congress had not permitted any taxes whatever to be assessed under authority of the State against your petitioner's capital, surplus and undivided profits, and that hence any tax sought to be imposed upon the petitioner, assessed against its capital, surplus and undivided profits was void and of no effect.

2. That the tax assessed by the City of Richmond at the rate of \$1.40 on each \$100 of petitioner's capital, surplus and undivided profits, when the tax assessed and collected by the said City of Richmond for the same year, under the same ordinance, upon other monied capital in the hands of individuals at the rate of only 30 cents on each \$100 was a discrimination against the capital, surplus and undivided profits of the petitioner, and in favor of such other monied capital in the hands of individuals, contrary to the Constitution and laws of the United States of America, and especially to section 5219 of the revised statutes of the United States.

3. That the tax which was levied, assessed and collected from the petitioner by the City of Richmond for the year 1915 under its said ordinance, at the rate of \$1.40 on each \$100 of the capital, surplus and undivided profits of the petitioner, when taken in connection with the tax which was levied, assessed and collected by the Commonwealth of Virginia at the rate of 35 cents on each \$100 of the actual value of the shares of stock of the petitioner, making a total State and City tax of \$1.75 on each \$100 of the capital, surplus and undivided profits of the petitioner, and the actual value of the shares of stock of the petitioner, when the tax levied, assessed and collected by the said City of Richmond for the same year under the same ordinance upon other monied capital in the hands of individuals was at the rate of 30 cents on each \$100 of the actual value thereof, and which tax taken in connection with the tax imposed by the State of Virginia at the rate of 65 cents on the \$100

actual value of such other monied capital in the hands of individuals, making a total tax of 95 cents on the \$100 of the actual value of such other monied capital in the hands of individuals, which was all the taxes imposed under authority of the said State upon such other monied capital in the hands of individuals, was an unwarranted discrimination against your petitioner, its capital, surplus and undivided profits and its shares of stock, and in favor of such other monied capital in the hands of individuals, contrary to the Constitution and laws of the United States of America, and especially to section 5219 of the revised statute of the United States.

All these objections were duly raised in the Supreme Court of Appeals of Virginia by specific assignments of error (manuscript record, pages 5 to 16, inclusive; printed record, pages 2 to 18, inclusive).

These assignments of error were specifically passed upon by the Supreme Court of Appeals of Virginia in its opinion rendered on the first writ of error in this case (manuscript record, pages 77 to 80, inclusive; printed record, pages 51 to 52, inclusive).

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the Supreme Court of Appeals of the Commonwealth of Virginia, commanding the said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of Appeals of the Commonwealth of Virginia, in the said case entitled "*The Merchants National Bank of Richmond, Virginia, against The City of Richmond and others,*" to the end that the said case may be reviewed and determined by this court, as provided by section 240 of the Judicial Code, and that your petitioner may have such other and further relief or remedy in the premises as this court may deem proper and in conformity with the said provision of the Judicial Code, and

that the said judgment of the said Supreme Court of Appeals of Virginia in the said case and every part thereof may be reversed by this Honorable Court.

MERCHANTS NAT'L BANK OF RICHMOND, VA.,
Petitioner.

(Signed) By JOHN C. WHITE,
E. WARREN WALL, Cashier.
LEGH R. PAGE,
Counsel for Petitioner.

STATE OF VIRGINIA,
City of Richmond—ss.

John C. White, being duly sworn, deposes and says that he is the cashier of the Merchants National Bank, of Richmond, Virginia, the petitioner named in the foregoing petition; that he has read and knows the contents thereof; that the same is in all respects true, to the best of his knowledge, information and belief.

Sworn to and subscribed before me this 21st day of February, 1920.

J. D. HUNTER (Seal),
Notary Public.

My commission expires June 27, 1923.

EXHIBIT B.

OPINION OF SUPREME COURT OF APPEALS OF VIRGINIA.

City of Richmond

v.

Merchants National Bank.

Error to Hustings Court of City of Richmond.

Reversed.

WHITTLE, P.:

This case originated in the Hustings Court with a petition by the Merchants National Bank of Richmond against the city of Richmond, to correct an alleged erroneous assessment for the year 1915, directly against the bank upon its capital stock, surplus and undivided profits, less the assessed value of its real estate and other deductions allowed by law, instead of being levied and assessed against the shareholders of the stock of the bank upon the value of their shares ascertained as the law prescribed. Moreover, complaint was made that the assessment, instead of being limited to the alleged maximum rate of thirty cents on each \$100 of the ascertained value of the shares of stock, was fixed, levied and collected at \$1.40 on each \$100 of such value. To an order of the Hustings Court granting the relief prayed for, this writ of error was allowed.

Two assignments of error were pressed: 1. That the court erred in overruling the motion of the City to dismiss the proceeding for want of jurisdiction. 2. In establishing thirty cents on the \$100 of value as the maximum rate that could be levied by the city on the shares of bank stock in place of \$1.40.

The first assignment rests upon the contention that the assessment, in essence, is against the stockholders, and therefore the proceeding should have been in their name and could not be maintained by the bank. *Main St. Bank, Inc., v. City of Richmond*, 122 Va., 15 Va. App. 481.

Whatever merit there may have been in this assignment in the first instance, the error in procedure was cured by

the consent order, *nunc pro tunc*, whereby the amount of tax ascertained to be due from the shareholders was assessed against them. The court, by virtue of the consent order, was within its powers thus to admit the shareholders (the real persons in interest) as parties, and to make a correct assessment against them. *Commonwealth v. Schmelz*, 114 Va. 364, 7 Va. App. 395.

2. The remaining controverted question for our determination is what was the maximum rate which the City of Richmond could lawfully levy on the shares of bank stock for the year 1915?

By way of premise to the consideration of this feature of the case, we may observe that the city of Richmond, under its charter, possesses plenary power of taxation, subject only to such limitations as may be placed upon the exercise of that power by the Constitution and Legislature.

The ordinance approved April 9, 1915, is founded upon the city charter and the segregation act passed by the General Assembly at its extra session of 1915, and approved March 15, 1915 (an emergency was declared to exist with respect to it, so that the act was in force from its passage). Acts 1915, Ch. 85, p. 119. The gravamen of the bank's complaint is that its capital is taxed at the rate of \$1.40 on the \$100, instead of thirty cents, the rate imposed on other moneyed capital in the hands of individuals. Its contentions are based on an alleged conflict between the ordinance and section 1040-a of the Code; section 168 of the State Constitution, the fact that at the date of the assessment the rate of taxation on all intangible property taxed that was also taxed by the State was at the rate of thirty cents on the \$100; and that a higher rate than thirty cents contravened section 5319, Rev. Stat. of the U. S. All of these objections except the last were practically disposed of by the construction placed upon the segregation act by the decision of this court in the case of *City of Richmond v. Drewry-Hughes Co.*, 122 Va., 15 Va. App. 161, 94 S. E. 989.

The history of the litigation of which that case is the sequel was this: By authority of the ordinance (one of

the features of which is here drawn in question) the city assessed the capital employed by Drewry-Hughes Co. (and other merchants residing and doing business in the city) in their business as merchants at \$1.40 on the \$100. From an order of the Hustings Court declaring the correct rate of taxation in that case to be 30 cents on the \$100, the city appealed, and at the November term, 1916, of this court that judgment was affirmed. The case again came before us on rehearing, and was ably argued by the original counsel, and also by others, whose localities were affected by the decision, on briefs; and in an exhaustive opinion, written by Judge Kelly and concurred in by all the other judges, the judgment of the Hustings Court was reversed. The last opinion covers the contentions stressed in this case save the insistence that the exception in the segregation act as therein construed would, if applied to national banks, be violative of section 5219, *supra*.

Since, therefore, we have no purpose to recede from the conclusions reached in the merchant's tax case, further elaboration of the question settled by that decision is unnecessary. This statement is predicated upon the view that the exceptions in the act of 1915, in respect to the capital of merchants and the shares of stocks of banks, in the particular here involved are so concatenated as necessarily to demand the same construction.

The act after segregating the several kinds and classes of property, so as to specify upon what subjects State taxes and upon what subjects local taxes may be levied, respectively, and limiting the maximum local rate of taxation on segregated intangible personal property at thirty cents on the \$100 of assessed value thereof, contains the following exception: "except that the capital of merchants shall not be subject to the State taxation, but may be taxed locally as prescribed by law; and the shares of stock of banks, banking associations, and other institutions enumerated in section seventeen in Schedule 'D' of the act aforesaid, which shares of stock shall be taxed as provided by law."

Judge Kelly, in his opinion, justly observed: "If the purpose of the draftsman had been to restrict local taxation of the capital of merchants to the rate previously named that particular act, undoubtedly he would have used the words, 'as prescribed by this act,' or their equivalent instead of 'as prescribed by law.' If this be not true, then it would follow that 'shares of stock of banks' could only be taxed locally at the 30-cent rate, as we have seen, it cannot be plausibly contended that the words, 'as prescribed by law,' when applied in the act to merchants' capital, have any other or different meaning than the words 'as provided by law' when applied therein to bank stock. The necessary result of the decision of this court in *Tresnon v. Board of Supervisors*, 90 S. E. 615 (120 Va. 203, 13 Va. App. 172) is that the local taxation of bank stock is not controlled by the terms of the segregation act."

Judge Kelly also points out that section 168 of the Constitution does not conflict with the right of the taxing power to tax different classes of intangible personal property at different rates. Citing *Judson on Taxation*, sec. 441; 37 Cyc. 746; *Bradley v. City of Richmond*, 110 Va. 521, 524, 3 Va. App. 877.

Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States, in that the tax of \$1.40 on the \$100.00 on the shares of bank stock is a higher rate than is assessed upon other "moneyed capital in the hands of individual citizens of the State:" Obviously the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

In 9 U. S. Comp. Stat. (1916), title "National Banks" at p. 11993, note 29, it is said: "Moneyed capital.—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase 'moneyed capital' used therein means capital engaged in the operations of banking, which is used as a source of profit, so that

Act N. Y. July 1, 1882, p. 312, declaring that the stockholders in banks organized under the authority of the State or United States shall be assessed for the value of their stock, was not void under this section, because the assessment roll showed that the securities of life insurance companies, the stock of State corporations, the deposits of savings bank, the stock of trust companies, and companies created outside of the State and owned in the State, virtually escaped taxation, since such property, excepting that of savings bank and trust companies, was not 'moneyed capital in the hands of individuals' as contemplated by this section, "*Mercantile Nat. Bank v. New York*, 1817), 121 U. S. 138, 30 L. ed. 895; *National Bank etc. v. Boston*, (1888) 125 U. S. 60, 31 L. ed. 689; *Palmer v. McMahon*, (1890), 133 U. S. 660, 33 L. ed. 772; *Talbott v. Board of Commissioners, etc.* (1891), 139 U. S. 438, 35 L. ed. 210; *First Nat. Bank v. County of Chehalis*, (1897), 166 U. S. 440; *New York, ex rel. Amboskeag Sav. Bank v. Purdy*, (1913), 231 U. S. 373, 58 L. ed 373.

These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of defendant in error, that the rate of tax imposed under the segregation act and the ordinances of the city upon the shareholders of bank stock constitutes "a gross and illegal discrimination against that species of property as compared with all other moneyed capital," is groundless.

In conclusion, it is only fair to the learned judge of the Hustings Court to State, that on August 3, 1917, when he delivered his judgment in this case fixing the maximum amount of tax against stockholders of bank stock at thirty cents on the \$100.00 the first decision of this court in *City of Richmond v. Drewry-Hughes Co.* was still in force, and he naturally regarded it as strongly persuasive if not controlling authority in the instant case.

For the reason given, the order complained of must be reversed, and the case remanded for further proceedings to be had therein in conformity with the view expressed in this opinion.

Reversed.

"EXHIBIT C."**Virginia Tax Laws.****TAX ON BANKS AND TRUST AND SECURITY COMPANIES.**

17. (As amended by act approved January 30, 1912.) No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, nor upon capital of any trust or security company chartered by this State, but the stockholders in such banks, banking associations, trust and security companies shall be assessed and taxed on their shares of stock therein. Each bank, banking association, trust and security company aforesaid, on the first day of February in each year, shall make up and return to the commissioner of the revenue of the county, city or town, or district in which said bank, banking association, trust or security company is located, a report in which shall be given the names and residences of all its stockholders, the number and actual value of the shares of stock held by each stockholder, and the amounts of all bonds, demands and claims owing by each stockholder as principal debtor and not otherwise deducted from his taxable property, but not including any money that may be due on account of the purchase of securities which are non-taxable. With this report there shall be filed the affidavit of each stockholder that the amount of the bonds, demands and claims stated in said report as owing by him as principal debtor is so owing by him as principal debtor, that this amount has not been and will not be otherwise deducted from his taxable property, and that it does not include any money that may be due on account of the purchase of securities which are non-taxable. From the total value of the shares of stock of any such bank, banking association, trust or security company, which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted the value of its real estate otherwise taxed in this State, or if the title to the building in which any such bank, banking

association, trust or security company does its business, and the land on which it stands, is held in the name of a separate corporation, in which such bank, banking association, trust or security company owns all or a majority of the stock, and such real estate be otherwise taxed in this State, then there shall be deducted from the value of the shares of stock of such bank such proportion of the assessed value of said real estate as the stock it owns in such holding corporation bears to the whole issue of stock in such corporation; and the actual value of each share of stock shall be its proportion of the remainder. In assessing said shares there shall be deducted from the actual values of the shares held by the stockholders the amounts of bonds, demands and claims owing by them as principal debtors and not otherwise deducted from their taxable property, but not deducting any money that may be due on account of the purchase of securities which are non-taxable; provided, that such deductions from the assessments of such shares of any bank, banking association, trust or security company shall not in any case exceed ten per centum of the total actual value of all its shares of stock. Each bank, banking association, trust and security company aforesaid shall at the time it pays the taxes assessed against its shares of stock as aforesaid pay to each stockholder (not as a dividend, but as deducted taxes), such an amount or proportionate amounts, if any, as he may be entitled to by reason of deducting the amounts of the bonds, demands and claims owing by him as aforesaid.

18. It shall be the duty of said commissioner of the revenue, as soon as he receives such report, to assess each stockholder upon the actual value of the shares of stock owned by him, less the amount of bonds, demands and claims owing by him as principal debtor and not otherwise deducted from his taxable property, as provided in the preceding section, but not including any money that may be due on account of the purchase of securities which are non-taxable, a tax of twenty-five cents on every hundred dollars' value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hun-

dred dollars' value thereof, which shall be applied to the support of the public free schools of the State, and he shall make out three assessment lists, give one to the bank, banking association, trust or security company, send one to the auditor of public accounts and retain one. The assessment list delivered to said bank, banking association, trust or security company shall be notice to the bank, banking association, trust or security company of a tax assessed against its stockholders, and each of them, and have the legal effect and force of a summons upon suggestion formally issued and regularly served. The tax assessed upon each stockholder in said bank, banking association, trust or security company shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, no matter in whose possession found, and have priority over any and all liens by deeds of trust, mortgages, bills of sale or other assignment made by the owner or holder, and take priority over all liens, by execution, garnishment, or attachment process sued out by creditors of the stockholders. The bank, banking association, trust or security company shall hold the dividend or other fund which belongs to the stockholder and in its custody at the time the assessment list is received, or that thereafter shall come its control, for the use of the Commonwealth, and apply the same to the payment of the tax assessed, and when thus applied shall be acquitted and discharged from all liability to the stockholder for the money thus disbursed.

19. Each bank, banking association, trust and security company, on or before the first day of June in each year, shall pay into the treasury the taxes assessed against its stockholders.

20. Should any bank, banking association, trust or security company fail to pay into the treasury the tax assessed against its stockholders on or before the first day of June in each year, then, as soon thereafter as practicable, the auditor of public accounts shall transmit to the treasurer of the county or city in which said bank, banking association, trust or security company is located, a copy of the assessment list furnished him by the commissioner of the

revenue, and it shall be said treasurer's duty to collect the taxes therein assessed, and to this end levy upon the stock of the taxpayer, or so much thereof as is necessary, to pay said tax and sell the same at public auction for cash, as other chattels and personal property are sold under execution. He shall give to the purchaser a bill of sale made under his hand and seal.

21. The bank, banking association, trust or security company, on presentation by a purchaser of his bill of sale, shall cause the stock therein described to be transferred to said purchaser, and he shall take a clear and unencumbered title to the stock purchased. Should the taxes assessed against said stockholders be not paid or collected as hereinbefore provided, the lists aforesaid shall stand and be treated and have the legal effect of tax tickets regularly made out against each of said stockholders named in said lists as to which tax the right of levy and distress has accrued to the Commonwealth, and the treasurer shall proceed to collect the same by levy or distress, and possess, all and singular, the authority and power conferred upon him by law to collect other State taxes, and be governed by sections six hundred and twenty-two and six hundred and twenty-three of the Code of Virginia.

22. The bank, banking association, trust or security company, which shall fail or neglect to comply with each and every provision of this act, for each separate offense, shall be fined not less than one hundred, nor more than five hundred dollars, which fine shall be recovered upon motion, after five days' notice, in the circuit, corporation, or hustings court, of the county or city in which the said bank, banking association, trust or security company is located. Said motion shall be in the name of the Commonwealth and presented by the attorney for the Commonwealth, of the court in which the motion is brought or made. The real estate of all banks, banking associations, trust and security companies shall be assessed on the land books of the commissioners of the revenue, with the same taxes with which other real estate is assessed.

EXHIBIT "D."

SECTION 1040A OF THE CODE OF VIRGINIA.

Sec. 1040a. Taxation of shares of stock issued by banks located in counties and cities.—(1) Hereafter each county or city in which any bank, either national or State, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county or city.

(2) That in so taxing said shares the said county or city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares.

(3) Whenever any commissioner of the revenue, before closing his assessment rolls or tax lists, shall receive from the cashier of a bank furnishing a list of the holders of bank stock, as required by law for the purpose of State taxation, or from the owner of any stock mentioned therein, a certificate of the commissioner of the revenue of the county or city of the State in which the owner of such stock lives, stating that certain shares of the stock mentioned in said list are owned by a resident of that county or city, and that the same have been returned for taxation for that year in such county or city, then the said commissioner of the revenue, to whom the said list of the holders of such bank stock has been furnished, shall deduct from the aggregate value of the shares set forth in said list the aggregate value of the shares mentioned in said certificate. The shares owned by non-residents of this State shall be taxed only at the place where the bank issuing the shares is located.

EXHIBIT "E."

SECTION 571 OF THE CODE OF VIRGINIA.

Any person assessed with county or city levies and other local taxes, on lands or other property, aggrieved by any such assessment, may, unless otherwise specifically provided by law, within two years from the first day of September, of the year in which such assessment is made, apply for relief to the circuit or corporation court of the county or city wherein such assessment was made; and thereupon the court shall order that he be exonerated of the payment of so much as is improperly assessed, if not already paid, and if paid, that it be refunded to him by the treasurer, who shall have credit for the same in his settlement; except, that where it is shown to the satisfaction of the court that there has been a double assessment of the same property in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, but that the erroneous tax has not been paid, the court may order that the applicant be exonerated from the payment of such erroneous assessments, even though the application be not made within two years, as hereinbefore required.

Whereas, the authorities are now enforcing the payment of all delinquent taxes whether doubly assessed or not, and the taxpayers have no adequate remedy against it, an emergency exists and this act shall be in force from its passage. (1914, p. 78. Inforce March 10, 1914.)

IN THE
SUPREME COURT OF THE UNITED STATES

MERCHANTS NATIONAL BANK OF RICHMOND, VA.,
PETITIONER,

against

THE CITY OF RICHMOND, VIRGINIA,
RESPONDENT.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

THE FACTS.

The uncontroverted facts are:

That the petitioner is a national banking association, organized and doing business under the national banking act of the Congress of the United States; that its banking house and principal office is located in the City of Richmond, Virginia; that on February 1, 1915, the aggregate of the petitioner's capital, surplus and undivided profits was \$1,441,293.97; that the assessed value of its real estate, located within the City of Richmond, amounted to \$111,050; that the indebtedness owed by certain of its stockholders as principal debtor amounted to \$11,321.86; that on April 9, 1915, the said City of Richmond passed an ordinance, which is

fully set out in the record in this case in the petition filed herewith, the third paragraph whereof, so far as material, is in words and figures following, to-wit:

"On all intangible personal property, including bonds and stocks, three-tenths per centum of value; on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital and surplus and undivided profits, one fifteen-hundredths per centum of value, provided that for the year 1915 the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value."

That acting under the pretended authority of the said ordinance, the commissioner of the revenue of the City of Richmond assessed against the petitioner for and on behalf of the said City of Richmond upon the aggregate value of petitioner's capital, surplus and undivided profits as aforesaid, less the assessed value of its real estate as aforesaid, and the indebtedness owed by certain of its stockholders as principal debtor as aforesaid, the said tax at the rate of \$1.40 on each \$100, the amount of said tax so assessed being \$18,429.20; that the petitioner paid to the said City of Richmond the whole of said tax when the same was due and payable, one moiety thereon, amounting to \$9,244.66 on the 17th day of June, 1915, and the other moiety thereon, amounting to \$9,255.66 on the 22nd day of December, 1915; that the Commonwealth of Virginia imposed and collected a tax for the said year 1915 upon the actual value of the shares of stock of the petitioner, at the rate of 35 cents on each \$100; that for the year 1915, the City of Richmond imposed, assessed and collected upon all bonds, notes and other evidences of debt and all other intangible personal property of any kind whatsoever, with the exception of bank capital, surplus and undivided profits, shares of bank stock and capital used or employed in a mercantile business, a tax at the rate of 30 cents on each \$100 of the actual value thereof; that for the year 1915, the Commonwealth of Vir-

ginia imposed, assessed and collected a tax at the rate of 65 cents on each \$100 of the actual value of all bonds, notes and other evidences of debt, after deducting from such actual value the indebtedness owed by the stockholders as principal debtor; at the said rate of 65 cents on each \$100 of the actual value of all other intangible property of whatsoever kind.

That there was in the City of Richmond, as of February 1, 1915, national banking associations with an aggregate capital, surplus and undivided profits, the assessed value of which for taxation, after deducting the assessed value of real estate owned by such national banking associations, and the debts owed by their stockholders as principal debtors, amounted to \$8,320,521, upon which the said City imposed, assessed and collected a tax at the rate of \$1.40 on each \$100, the said tax amounting to \$116,427.80; that there was in the said City at the said time State banks, trust companies and State bank and trust companies with an aggregate capital, surplus and undivided profits, the assessed value of which for taxation, after deducting the assessed value of real estate owned by such banks and trust companies, and the debts owed by their stockholders as principal debtors, amounted to \$6,030,294, upon which the said City imposed, assessed and collected a tax at the rate of \$1.40 on each \$100, the said tax amounting to \$84,425.40; that there was in the City of Richmond on February 1, 1915, notes, bonds and other evidences of indebtedness, credits, claims and demands, the aggregate value of which, after deducting the indebtedness of the owners thereof, amounted to \$6,250,252, upon which the said City of Richmond for the said year imposed a tax at the rate of 30 cents on each \$100, the tax so imposed amounting to \$18,750.75.

These facts were alleged in the petition for the correction of the assessment filed in the Hustings Court, were undenied by the answer of the City of Richmond, and were abundantly established in the evidence. The subsequent history of the litigation is disclosed in the petition for *certiorari*, and need not here be repeated at length.

The attention of the court is respectfully directed to the finding of fact by the Hustings Court of the City of Richmond (manuscript record, pages 35 and 36; printed record, page 21; manuscript record, pages 40 and 41; printed record, page 25) that the tax in question was assessed by the City of Richmond against the capital, surplus and undivided profits of the petitioner, and not upon the value of its shares of stock. This finding of fact was not disturbed by the Supreme Court of Appeals of Virginia upon the first appeal in this case. Neither in the opinion of the court, nor in its judgment, is there any intimation that the court intended to reverse this finding; and moreover, the Supreme Court of Appeals of Virginia, in the final order in this case (manuscript record, page 84; printed record, page 54), itself finds as a fact that the assessment in question was erroneous and improper, and was assessed against the petitioner upon its capital, surplus and undivided profits, the language of the court being as follows:

"The petition of the Merchants National Bank of the City of Richmond for a writ of error and superseas to a judgment rendered by the Hustings Court of the City of Richmond on the 19th day of April, 1919, by which the application of the plaintiff for the correction of *an erroneous and improper assessment of taxes assessed against it by the City of Richmond upon its capital, surplus and undivided profits for the year 1915*, was denied and its petition dismissed, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and superseas, the effect of which is to affirm the judgment of the said Hustings Court." (Italics supplied.)

ARGUMENT.

Before entering upon a discussion of the law in this case, the petitioner, the Merchants National Bank of Richmond, Virginia, desires emphatically to disclaim any intention to escape its fair share of the burden of taxation or to deprive the respondent, the City of Richmond, Virginia, of any revenue to which it is justly entitled. It is advised and believes that gross discrimination exists in the taxation of bank capital and bank shares, which discrimination is most vividly shown by the record in this case, from which it appears that Bank capital is taxed by the said City at the rate of \$1.40 on the \$100, and no other moneyed capital in the hands of individuals is taxed by it at a rate exceeding 30 cents on the \$100. This has been the gravamen of the complaints of the bank throughout, a fact which has been hitherto passed over by the City of Richmond without discussion, the defense being made wholly upon technical grounds.

The City Attorney has labored industriously to make it appear that the claim of the bank is based solely on the technicality that the assessment in question was made against the bank and not against the shareholders upon the value of their shares of stock. All the cases which he cites go to sustain the proposition that an assessment which is otherwise valid will not be set aside because of some mere technicality which in nowise effects the substantial rights of the taxpayer. He assumes without attempting to prove that the City had a right to assess a tax at the rate of \$1.40 on the \$100 against the shareholders on the value of their shares of stock, and it argues that the assessment should not be invalidated on account of a mere imperfection in the assessment even though this "imperfection" consists in the assessment of the tax in a manner directly forbidden by the statute. Not only this, but the respondent also asks the court to overlook this "imperfection" and to regard the tax as assessed against the shareholders, in order to sustain the purely technical position that the application by the bank should be dismissed because the tax should have been assessed against the shareholders, and hence if it is regarded

as so assessed, the bank would have no standing in court.

However, the record in this case abundantly demonstrates that the complaint of the bank is not founded on the ground that the bank is assessed with the tax, nor is it founded upon the ground that the tax is \$1.40 on the \$100. It is founded on the ground that the assessment of other stocks and all other moneyed capital is at the rate of 30 cents on the \$100. This gross discrimination, taxing the bank at 4-2/3rd times the rate applied to all other stocks and all other moneyed capital, gives the bank a just and equitable reason for asking this court not to defeat the tax system of the City of Richmond in so far as bank taxation is concerned, but simply to put its property on equality with other similar property. The point relating to method of assessment of the tax against the bank instead of against the shareholders was only incidental, and it came into prominence only when the City advanced the technical claim that the petition should be dismissed because the bank was not assessed with the tax and was not aggrieved thereby. When the City thus attempted to shirk its obligation to return money wrongfully collected by it upon a ground which in nowise affected the merits of the case, it then became necessary for the bank to emphasize the fact that not only was the tax assessed at a grossly discriminatory rate, but that it was also assessed against the bank itself in a manner prohibited by the law, both State and Federal.

We rely for reversal of the judgment of the court below upon the following grounds:

I.

THE ASSESSMENT IN QUESTION WAS VOID AND OF NO EFFECT BECAUSE IT WAS MADE AGAINST THE BANK UPON ITS CAPITAL, SURPLUS AND UNDIVIDED PROFITS *IN SOLIDO*, AND NOT AGAINST THE SHAREHOLDERS UPON THE VALUE OF THEIR SHARES OF STOCK THEREIN.

II.

THE ASSESSMENT SHOULD HAVE BEEN AT THE RATE OF THIRTY CENTS ON THE \$100 VALUE OF THE SHARES OF STOCK AND NOT AT THE RATE OF \$1.40 ON THE \$100 ON THE AGGREGATE OF THE CAPITAL, SURPLUS AND UNDIVIDED PROFITS OF THE BANK, LESS THE VALUE OF ITS REAL ESTATE.

I.

On the first point, it is respectfully submitted that the finding of fact by the Hustings Court of the City of Richmond that the tax in question was assessed upon the capital, surplus and undivided profits of the petitioner, and the affirmance of this finding by the Supreme Court of Appeals of Virginia is not open to question in this court. However, that this was the only possible finding which could have been made is amply shown by the record in this case.

The tax was assessed, levied and collected under the ordinance of the City of Richmond approved April 9, 1915, providing that the tax rate for the City of Richmond shall be:

"On all intangible personal property, including bonds and stocks three-tenths per centum of value, on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital, surplus and undivided profits, and one and one fifteen-hundredth per centum of value, provided that in 1915 *the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value.*" M. R. p. 42. P. R. p. 26. (Italics supplied.)

The respondent has undertaken to show that the tax was not assessed under this ordinance but under an ordinance of 1906, and that even if the tax was assessed under the ordinance of April 9, 1915, it takes the position that the

court should construe away the plain language of its provisions and give it a meaning utterly opposed to this language. The futility of the first position is shown by the testimony of Mr. Tresnon, as follows:

"Q. When you made the assessment, you had the ordinance before you and that ordinance was in force and operation, was it not?

A. This ordinance was in operation for personal property and for intangible personal property for 1915.

Q. This ordinance, as I understand it, was furnished by the city clerk to you as an ordinance of the city of Richmond then in force, to be used in your official duties?

A. This ordinance was furnished me as an ordinance of the city of Richmond, approved April 9, 1915. Each ordinance has to be furnished to the head of each department after it has been approved and printed.

Q. And was in force when you made the assessment?

A. It was approved and in force when the assessment was made.

Q. That was the ordinance you followed when you made the assessment?

A. I made the assessment at the \$1.40 rate as the ordinance prescribed." (M. R., p. 48-49; P. R., p. 31-32.)

It is further proved by his statement that for 1915 the city rate on intangible personal property was 30 cents on the \$100.00, and it is demonstrated by the fact that for 1915 the city rate on tangible property and real estate was \$1.65 on the \$100.00. Obviously if the city tax for 1915 was assessed under the ordinance which was in force on February 1, 1915, to-wit, the ordinance of 1906, then the rate on all property, real and personal, tangible and intangible, should have been \$1.40 on the \$100.00. However,

the segregation act, Acts 1915, page 119, forbade the city of Richmond to assess a tax for the year 1915 in excess of 30 cents on the \$100.00 on all segregated intangible property and Mr. Tresnon testified that the city did assess and collect for that year taxes on said intangible property at the 30 cent rate only, as prescribed by the segregation act and by the ordinance of April 9, 1915. (M. R., p. 54; P. R., p. 36.)

Moreover, as stated by his Honor Judge Richardson (M. R., p. 39; P. R., p. 24) :

“In this case I am of opinion that this assessment was made after the ordinance of April 9, 1915, became a law, and that it was made thereunder and according to its provisions.

“To decide otherwise, that is, to hold that the assessments for the year 1915 should have been made under the ordinance in force on the first day of February, of that year, would lead to great confusion and loss on the part of the city. Under the ordinances of February 13, 1906, the rate of tax on real estate, and tangible personal property was \$1.40 on the \$100.00 of value. Under the ordinance of April 9, 1915, the rate on the same classes of property was raised to \$1.65 on the \$1.00 of value, and taxes on that class of property at the last mentioned rate were imposed and collected for the year 1915. If the ordinance of April 9, 1915, did not apply to the assessments for that year, then every person who paid taxes on real estate and tangible personal property for 1915 would have the right to demand that the excess be refunded to him.”

It cannot be denied that an amendment, such as the amendment to Sections 2 and 3 of Chapter 15 of the Richmond city Code of 1910 concerning the levying of taxes, the ordaining clause of which provided that:

"Sections 2 and 3 of Chapter 15 of the Richmond city Code of 1910 be amended and reordained so as to read as follows"

is a repeal of the Section which it amends, wiping it out entirely and substituting for it the language of the amending ordinance, and as the Supreme Court of Appeals of Virginia said in *Hicks v. Bristol*, 102 Va. 864:

" 'A repeal of a tax law,' says Cooley on Taxation, 2nd Edition, page 21, 'puts an end to all right to proceed to a levy of taxes under it, even in cases already commenced, unless the right is reserved in the repealing statute, and statutory remedies for the enforcement of a tax are gone when the statute is repealed without a saving.' "

Therefore, since the tax in this case was assessed, extended and collected after this ordinance of April 9, 1915, became a law, it was the only authority which the Commissioner of Revenue had for the extension and assessment of any tax upon any property in the city.

This ordinance provides for two entirely separate and distinct taxes, which are to be collected from banks. It provides for the tax of 30 cents on each \$100.00 of the value of the stock in each bank to be assessed against the shareholders and collected from the bank in accordance with the provisions of the Acts of the General Assembly of Virginia for collecting a State tax upon bank stock, and the ordinance also provides for the assessment of a tax of \$1.40 on each \$100.00 of the value of the bank's capital, surplus and undivided profits, less the assessed value of its real estate, included in said capital, surplus and undivided profits.

The ordinance might by construction less violent than that adopted by the city of Richmond in its efforts to reconcile its language to the city's claims be separated and rearranged as follows:

"On all intangible personal property, including bonds and stocks, three-tenths per centum of value. The taxes upon such shares of stock in any bank located and doing business in the city shall be assessed and collected in accordance with the provisions of the Acts of the General Assembly of Virginia of 1915.

On bank capital, surplus and undivided profits, less assessed value of real estate included in said capital, surplus and undivided profits, \$1.15 per centum of value, provides that for the year 1915 the tax on bank capital, surplus and undivided profits shall be 1.4 per centum of value."

The former is legal and proper, the latter illegal and void.

In this phase of the case, the only question for the court to pass upon was which of these mandates of the ordinance did the Commissioner of the Revenue obey in assessing the tax in question. Did he assess a tax on the shares of stock in the hands of the shareholders at the rate of 30 cents on the \$100.00, or did he assess a tax upon the capital, surplus and undivided profits of the bank, less the assessed value of the real estate of \$1.40 on the \$100.00? The Commissioner of Revenue testifies that he assessed a tax at the rate of \$1.40 on the \$100.00, and that his assessment for said purposes was in the following words and figures:

"Q. Will you please turn to that book and read the entry upon it relating to the assessment of the Merchants National Bank for 1915?

A. "Merchants National Bank, 1915, value \$1,320,662.11; tax on that value, \$18,489.20', on the city personal property book for 1915." M. R. p. 46. P. R. p. 30.

This record of the assessment made by Mr. Tresnon constituted the one official record of the assessment which he made for 1915 against either the bank or its shareholders.

His testimony throughout shows that it was the only assessment he made. It was the solitary record in his office touching any indebtedness of the Merchants National Bank or its shareholders to the city of Richmond for any taxes in 1915.

"Q. Did you ever notify any stockholder of the Merchants National Bank of this assessment?

A. No, sir.

Q. Did you ever render a bill to any stockholder?

A. No, sir. We are not required to render bills. We do not render bills to anybody.

Q. Or make any entry against them on your book?

A. I make no entry on the books at all against them." M. R. pp. 55, 56. P. R. pp. 37, 38.

To show that the Commissioner, himself, did not treat or consider Exhibit "G" and "H" as any part of the assessment of city taxes, but that he did regard it as a necessary part of the State assessment, he testified as follows:

"Q. Did you make the assessment of taxes for 1915 on banks?

A. I made the assessment from the reports received from the banks." (R. R., p. 45; P. R., p. 29.)

In *Williams v. Supervisors of Albany*, 122 U. S. 164-5, it was said:

"A list when received by the assessor does not constitute an assessment but only aids in obtaining a true description of taxable property and is evidence from which an assessment may be made."

Again, Mr. Tresnon testified:

Q. Please examine this paper now handed you (Exhibit "G"), which appears to be a blank form prepared by the Auditor of Public Accounts, fur-

nished to the Commissioner of the Revenue as an assessment form for 1915 on the shares of stock of the stockholders, and State whether or not that is the form in which the taxation of banks was entered in your office *in favor of the State* in 1915?

A. This for is the assessment form furnished by the Auditor of Public Accounts to make the assessments on the shares of stock in the different banks held by the individual stockholders and reported back to him, and also to furnish each bank with a copy of the same.

* * * * *

"Q. That is what you certify to the Auditor?

A. Yes.

Q. As having been taxed on the shares of stock *for State purposes*?

A. Yes.

xQ. *You certify that under your hand as Commissioner of the Revenue?*

A. Yes.

xQ. Did you do so in this case?

A. Yes.

xQ. Did you furnish the bank with a copy of it?

A. I did.

By Mr. Pollard: I call upon the bank to produce that paper that was filed with them of the assessment in 1915.

(Counsel for petitioner produce the paper.)

xQ. Please examine this paper and state whether or not that is the paper which you furnished to the bank.

xQ. Do you identify it, *although not signed*, as the paper that was furnished?

A. Yes.

xQ. What did you similarly do with the purpose of having the city taxes entered against the stockholders that were indebted on account of the city assessment? What, if anything, did you do?

A. I entered it on the personal property book. I put down the name of the bank, the values, and extended the tax on the values of that bank at the rate of \$1.40 rate." M. R. pp. 62, 63, P. R. pp. 43, 44.

Exhibit "H," which, so far as the city tax was concerned, had no place in the record of taxation in the assessment of city taxes, was merely a loose paper which the Commissioner of Revenue kept in his office for his own convenience and was not authenticated by him as a public record of city taxes.

"Q. You kept no copy of this assessment in your office where you taxed the banks for city taxes for 1915, did you?

A. I kept a combination copy.

Q. What do you mean by that?

A. I have the values for city purposes and the values for State purposes—City taxes and State taxes—in a summary sheet." M. R. p. 64. P. R. p. 45.

Again:

"xQ. And the paper that was introduced here when you were on examination in chief is the mode you adopted to accomplish the end in view,—to make an assessment roll for the city taxes?

A. The assessment for city taxes on the aggregate of values." M. R. p. 63. P. R. p. 44.

"What is on the personal property book?

A. Value, \$1,320, 662.11; taxes, \$18,489.20.

Q. That is all that is on the personal property book?

A. Yes.

Q. You said the personal property book contained a summary. Does it contain any reference to stockholders?

A. No, sir.

Q. The only thing it contains is the name of the bank, which is put in the place where appears the names of the persons assessed with personal property, then the amount with which it is assessed, then the taxes on that amount. That is all that appears upon the official record known as the personal property book?

A. Yes, sir.

Q. Now, as to loose papers you keep in your office, which have just been referred to as Exhibit "H," there is no reference to them in this official record?

A. No, sir.

Q. And no summary of them?

A. No, sir.

Q. No reference to shares of stock?

A. No, sir.

Q. It is a plain assessment against the bank upon a particular amount, with the tax set opposite, is it not?

A. Yes, sir." M. R. p. 67. P. R. pp. 45, 46.

While the testimony of this witness abundantly shows that he neither intended nor did he make the assessment against the shareholders of the bank, but against the bank itself *in solido* on its capital, surplus and undivided profits, if authority is needed to support the position that such an assessment is not in compliance with the law, we call the court's attention to the case of *Miller, Treasurer v. First National Bank and others*, 46 Ohio State, 424, where, under facts and under a law taxing bank stock practically similar to the facts and the State statute in this case, it was held:

"That there is no authority in the statutes of the States, nor of the United States, for listing and valuing he shares in a national bank in the aggregate and placing such aggregate on the tax list in the name of the bank. Such shares when listed and valued for taxation are required to be placed on the proper tax lists in the names of the respective owners."

It is thus clearly demonstrated that the record of the taxes for State purposes charged against the Merchants National Bank for 1915 was Sections 17, 18, 19, 20, 21, and 22 of the tax bill of the Commonwealth of Virginia, and the roll made out on the blank form, Exhibit "G," furnished by the Auditor of Public Accounts, in which the taxes were assessed against the individual shareholders on their shares of stock, which assessments roll *was certified to the Auditor of Public Accounts by Mr. Tresnon under his hand as Commissioner of the Revenue*. It is equally plain that the record of the taxes for city purposes charged to the Merchants National Bank for 1915 was the ordinance of the city of Richmond, adopted April 9, 1915, and the entry made against the Bank by Mr. Tresnon on the property book. This book was duly signed by the Commissioner of the Revenue, this book then constituted a permanent record, and was the only foundation which the city had for its remedies for the collection of its taxes.

That the Hustings Court of Richmond and the Supreme Court of Appeals of Virginia were entirely right in holding that the tax was assessed directly against the Merchants National Bank itself upon its capital, surplus and undivided profits *in solido* instead of against the shareholders upon the value of their shares will appear (1) from the express terms of the ordinance of April 9, 1915, levying the tax; and (2) from the assessment of the tax by the Commissioner of Revenue in accordance with said ordinances as it appears on the personal property book upon which he is required to list all personal property in the name of the owner.

These two documents, namely, the ordinances levying the tax and the entry on the personal property book assessing the tax, constitute the only record of the tax and, like the records of a court, after it leaves the hands of the commissioner becomes final and incapable of change except by an order of the proper court under authority of the statute alone; it may be the basis for an execution or distraint. If any further reply to Mr. Pollard's argument upon this branch of the case be needed, it is only necessary to advert to the above quoted evidence in which Commissioner Tresnon admits in express terms that he assessed on the personal property books the city tax directly against the Merchants National Bank instead of against its shareholders. At the same time he expressly stated that while the city tax was assessed in this way it was entirely different with respect to the State tax which was assessed upon the roll or list furnished by the auditor for that purpose and was not entered upon the personal property books at all and that said roll or list was no part of the assessment of city taxes.

For the foregoing reasons, it is respectively submitted that the assessment complained of was manifestly made against the petitioner upon its capital, surplus and undivided profits *in solido*, and not upon the value of its shares of stock in the hands of its shareholders, add that, therefore, the order or judgment of the Hustings Court of the city of Richmond, entered on the 3rd day of August, 1917, was plainly right, and should have been affirmed by the Supreme Court of Appeals of Virginia.

II.

THE ASSESSMENT SHOULD HAVE BEEN MADE AT THE RATE OF THIRTY CENTS ON THE \$100.00 VALUE OF THE SHARES OF STOCK AND NOT AT THE RATE OF \$1.40 ON THE \$100.00 ON THE AGGREGATE OF THE CAPITAL, SURPLUS AND UNDIVIDED PROFITS OF THE BANK, LESS THE VALUE OF ITS REAL ESTATE.

It is disclosed by the record (M. R. p. 50, P. R. p. 33) that the total value of the capital of national banks upon where the city of Richmond imposed a tax at the rate of \$1.40 for the year 1915 was \$8,320, 521.00, the tax upon this value amounting to \$116,487.20, and that the total value of the capital, surplus and undivided profits of State banks, trust companies, and State banks and trust companies upon which the city of Richmond imposed a tax at the rate of \$1.40 for the year 1915 was \$6,030,294.00 the tax upon this value amounting to \$84,425.40. It is further shown by the record (M. R., p. 70; P. R., p. 48) that the total value of notes, bonds and other evidences of indebtedness, credits, demands and claims assessed with taxes by the city of Richmond for the year 1915 amounted to \$6,250,252.00; that the rate of tax imposed by the said city upon this class of property was 30 cents on each \$100.00; that the owners of this class of property had the right to deduct from the taxable value of such property all debts owed by them to others as principal debtor, and not as guarantor, surety or endorser.

The petitioner submits, with all confidence, that this class of property, consisting of bonds, notes and other evidence of debt, credits, claims and demands, constitutes other moneyed capital in the hands of individuals as defined by this court in a long line of cases.

In the leading case of the *Mercantile Bank v. New York*, 121 U. S. 138, the court held that the term "other moneyed capital in the hands of individuals,"—meant

"Money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is generally known as personal property. Accordingly, it was said in *Evansville Bank v. Britton*, 105 U. S. 322: 'The Act of Congress does not make the tax on personal prop-

erty the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way.' This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

In the case of *Boyer v. Boyer*, 113 U. S., p. 689, it was decided that a local tax upon shares of national bank stock was repugnant to Section 5219 of the Revised Statute of the United States because the laws of Pennsylvania exempted from local taxation railroad securities, shares of stock held by stockholders in corporations which were liable to pay certain tax to the State, mortgages, judgments, recognances, money due on contracts for the sale of real estate and loans of corporations which were not taxable for local purposes when the State tax should be paid. It was held that under these circumstances this discrimination in favor of other moneyed capital and against capital invested in shares of national banks was inconsistent with the provisions of Section 5219 of the Revised Statutes of the U. S., that taxation by authority of the State upon national bank shares shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals in such State. It may not be amiss to remark that Pennsylvania has accepted this decision in good faith and has never

since attempted to tax bank shares at a higher total rate than 40 cents on the \$100.00, the rate imposed on other moneyed capital and other intangible property.

It is not clear in this case that all other intangible property save bank stock was segregated to the State for purposes of taxation, nor that all other moneyed capital was so segregated but the court held that the amount of other moneyed capital so segregated was sufficient to make the discrimination against national bank shares palpable. Indeed, in no case which has gone to the Supreme Court of the United States has it appeared that all other moneyed capital in the hands of individuals enjoyed a lower rate of taxation than that imposed on national bank shares, as is the case here. The question in all of these cases has been whether there was a sufficient amount of such other moneyed capital which was so favored to constitute a palpable discrimination. In this respect this case differs from any other case heretofore passed upon by this court.

The case of *Mercantile National Bank v. New York*, *supra*, reviews practically all antecedent cases and is quoted extensively by all succeeding ones.

In the case of *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, decided December 1, 1913, Mr. Justice Pitney, delivering the opinion of the court, reviewed the whole law on the subject and cited with approval the cases of *Evansville Bank v. Britton*, *supra*, and the *Mercantile National Bank v. New York*, *supra*.

Referring to the latter case, the court said:

"And the meaning of the term 'other moneyed capital' has been elucidated by several decisions, of which the leading case is the *Mercantile Bank v. New York*."

Notes, bonds and other evidence of indebtedness, of which the evidence shows there was the large sum of \$6,-250,252.00, returned and assessed for taxation in the year 1915, are those declared to be "other moneyed capital in

the hands of individuals" within the meaning of the statute and in competition with the money invested in shares of stock of national banks.

It is, therefore, respectfully submitted that the Supreme Court of Appeals of Virginia erred in reversing the judgment of the Hustings Court of the city of Richmond, entered on the 3rd day of August, 1917; that the Hustings Court of the city of Richmond erred in its judgment entered on the 19th day of April, 1919, dismissing the petition or application of your petitioner, and refusing the relief sought; that the Supreme Court of Appeals of Virginia erred in its judgment entered on the 25th day of November, 1919, refusing a writ of error to the said judgment of the Hustings Court of the city of Richmond; and that, for these reasons, a writ of *certiorari* should be granted.

Respectfully submitted,

MERCHANTS NATIONAL BANK OF RICHMOND.

E. WARREN WALL,
LEGH R. PAGE,

Counsel




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JAMES D. MAHER,
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No.  240

MERCHANTS NATIONAL BANK OF RICHMOND, VA.
Plaintiff in Error.

VS.

CITY OF RICHMOND

ANSWER OF THE RESPONDENT ON THE APPLICATION OF THE PLAINTIFF IN ERROR FOR A WRIT OF CERTIORARI.

H. R. POLLARD,
GEO. WAYNE ANDERSON,
Counsel for City of Richmond.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 710.

MERCHANTS NATIONAL BANK OF RICHMOND, VA.

Plaintiff in Error.

vs.

CITY OF RICHMOND

ANSWER OF THE RESPONDENT ON THE APPLICATION
OF THE PLAINTIFF IN ERROR FOR A
WRIT OF CERTIORARI.

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE
UNITED STATES:

The respondent, the City of Richmond, for answer to the said application for writ of certiorari, or to so much thereof as it deems material, says:

The records of this Honorable Court will show that on the application of the Merchants National Bank, appellant, in a suit lately theretofore depending in the Supreme Court of Appeals of Virginia under the style of City of Richmond v.

Merchants National Bank, a writ of error was awarded by the said Supreme Court of Appeals of Virginia to this Honorable Court on the 30th day of December, 1919, and the same is now pending and undecided in this Honorable Court, from which it necessarily follows that this Honorable Court is without jurisdiction to award the writ of certiorari prayed for in the petition of the said plaintiff in error, the hearing of which is fixed for the 29th day of March, 1920, for the following reasons:

1. Because the power conferred upon the Federal Supreme Court by the Judicial Code, sec. 240, to require by writ of certiorari that cases in the circuit court of appeals be certified for review and determination in the former court, is plainly confined to that class of cases in which, according to the provisions of sections 128 and 241 of such Code, the final judgments and decrees of those courts are not reviewable upon appeal or writ of error. (*United States v. Beatty*, 232 U. S. 463, 466-7.)

2. While it is true that something was omitted from the transcript of the record of the said case in the Supreme Court of Appeals of Virginia which was necessary for the proper and final determination of the said writ of error to the Supreme Court of the United States, yet, on the suggestion of counsel for respondent, in order to cure said defect, a stipulation and agreement between the counsel for the Merchants National Bank and the City of Richmond was entered into, by which it was agreed that such omitted part of said record, identified as consisting of printed pages numbered consecutively from 1 to 53 should be printed under the supervision of the Clerk of this Honorable Court in the same manner as the residue of the record and inserted by the Clerk of this Court by attaching the same to each of the copies of the record in this case then on file in the office of the Clerk of this Honorable Court, which agreement was reduced to writing and signed by said counsel on March 13, 1920, together with said omitted pages so identified and in execution of said agreement the same has been

by the Clerk of this Honorable Court inserted in or attached to the said original record, the effect of which, as this respondent is advised, supplies all and every omission from such record of the proceedings had before the Hustings Court of the City of Richmond and the Supreme Court of Appeals of Virginia, and is now a part of said record as completely as if the same had been originally copied and printed with said copy certified to this Honorable Court by the Clerk of the Supreme Court of Appeals of Virginia, which certificate of identification will be found on page 62 of said record.

3. Because as the record now stands there is no diminution of the same stated in the petition or otherwise shown, for which cause alone, in a case like this, a writ of certiorari may issue. (*United States v. Adams*, 9 Wallace 661; *Goodenough Mfg. Co. v. Rhode Island, etc., Co.*, 154 U. S. 635-636.)

4. Because notice has been served on counsel for the plaintiff in error that on the 19th day of April 1920, the defendant in error will move this Honorable Court to dismiss or affirm the judgment of the Hustings Court of the City of Richmond and of the Supreme Court of Appeals of Virginia on grounds and authorities fully set forth in a brief accompanying said motion, which motion and brief have been duly printed in accordance with the rules of this Honorable Court and are now on file in the Clerk's Office of this Honorable Court, a copy of which is attached to this answer and prayed to be read as a part thereof.

5. Because by comparison of the brief of counsel for the petitioner praying said writ of certiorari with the record as now amended and the brief of counsel for the defendant in error on the motion to dismiss or affirm, it will be seen that the facts set forth in said petition praying said writ of certiorari are largely founded upon facts de hors the record as it now stands, and therefore cannot justify the issuance of said writ. (*Furness, etc., Co. v. Insurance Assn.*, 242 U. S. 430; *Fields v. U. S.*, 205 U. S. 292.)

Wherefore respondent submits that the said application for writ of certiorari should be denied and the said petition praying therefor dismissed.

Respectfully submitted,

CITY OF RICHMOND,

By COUNSEL.

H. R. POLLARD,

GEO. WAYNE ANDERSON,


Counsel for the City of Richmond.

JAMES D. MAHER;
CLERK.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 110.

 240

MERCHANTS NATIONAL BANK OF RICHMOND, VA.
Plaintiff in Error

vs.

THE CITY OF RICHMOND

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

NOTICE AND MOTION TO DISMISS OR AFFIRM AND
BRIEF IN SUPPORT OF SAME.

H. R. POLLARD,
GEO. WAYNE ANDERSON,
Counsel for Defendant in Error.



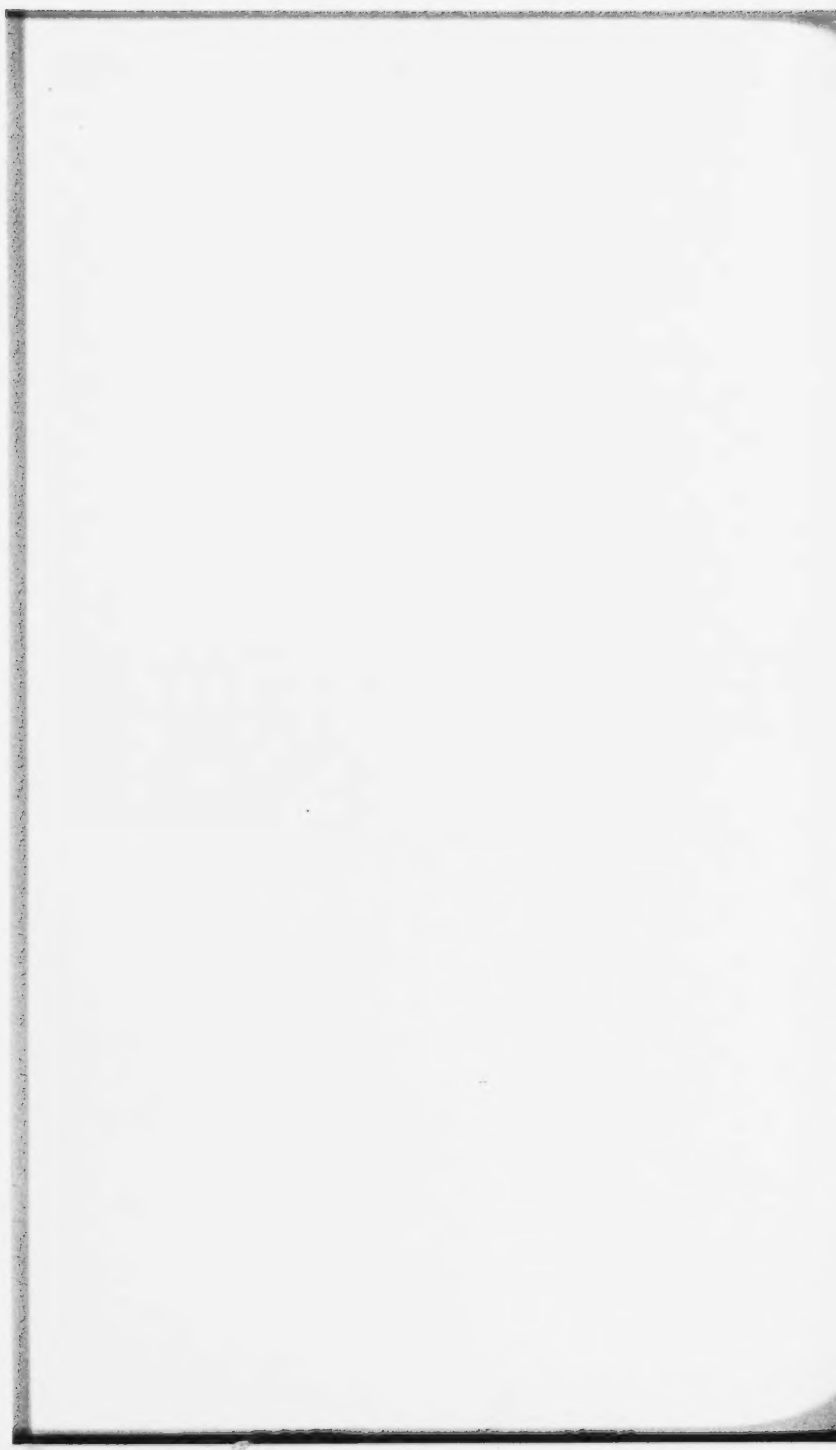
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 710.

MERCHANTS NATIONAL BANK OF RICHMOND, VA.
Plaintiff in Error

vs.

THE CITY OF RICHMOND

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

NOTICE.

TO MR. E. WARREN WALL AND MESSRS. PAGE & LEARY,
Counsel for Merchants National Bank:

TAKE NOTICE that on the 19th day of April, 1920, at 12 o'clock noon of that day or as soon thereafter as counsel can be heard, the City of Richmond, defendant in error in the above entitled cause, will move the Supreme Court of the United States to dismiss this cause:

FIRST: Because no Federal question was decided by the Supreme Court of Appeals of Virginia, and hence the writ of error was improvidently awarded; and

SECOND: Because it is manifest that the appeal was taken for delay only and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

CITY OF RICHMOND,

By Counsel,

H. R. POLLARD,

GEO. WAYNE ANDERSON,

Counsel for the City of Richmond.

Legal service of the foregoing notice and motion to dismiss or affirm with brief in support of the same acknowledged this . . . day of March, 1920.

E. WARREN WALL,

PAGE & LEARY,

Counsel for Merchants National Bank,

Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 710.

MERCHANTS NATIONAL BANK OF RICHMOND, VA.
Plaintiff in Error

vs.

THE CITY OF RICHMOND

MOTION OF THE DEFENDANT IN ERROR TO DISMISS FOR
WANT OF JURISDICTION, OR TO AFFIRM OR DISMISS
THE ORDER COMPLAINED OF.

FIRST

The City of Richmond moves the court to dismiss these proceedings for the reason that no Federal question was decided by the Supreme Court of Appeals of Virginia, and hence the writ of error was improvidently awarded.

The record shows that the proceedings were statutory, the same being authorized to be instituted by section 571 of the Code of Virginia, 1887, as amended by an act of the General Assembly approved March 10, 1914, which is in the following language:

"Sec. 571. Redress against erroneous assessment of levies and local taxes.

"Any person assessed with county or city levies and other local taxes, on lands or other property, aggrieved by any such assessment, may, unless otherwise specifically provided by law, within two years from the first day of September, of the

year in which such assessment is made, apply for relief to the circuit or corporation court of the county or city wherein such assessment was made; and thereupon the court shall order that he be exonerated from the payment of so much as is improperly assessed, if not already paid, and if paid, that it be refunded to him by the treasurer, who shall have credit for the same in his settlement; except, that where it is shown to the satisfaction of the court that there has been a double assessment of the same property in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, but that the erroneous tax has not been paid, the court may order that the applicant be exonerated from the payment of such erroneous assessments, even though the application be not made within two years as hereinbefore required." (Acts of Assembly of Virginia, 1914, p. 78.)

It is proper to observe that the statute does not require that the application for the correction of an assessment of taxes should be in writing, though it is true, as the record discloses, that the plaintiff in error filed in the Hustings Court of the City of Richmond a detailed and elaborate paper, denominated as a "petition" (Record, pp. 9-14), many of the statements and allegations in which are *de hors* the material issues. Among the material issues, as we think, it will appear, the following is set forth: That the Commissoiner of the Revenue of the City of Richmond, with whom the petitioner had filed the report required by section 17 of the Revenue Bill of the State of Virginia, illegally assessed against petitioner, on behalf of the City of Richmond, as of the first day of February of the year 1915, a tax of \$18,489.20 under and by virtue of an alleged ordinance of the Council of the City of Richmond approved April 9, 1915, and that the amount so assessed was arrived at by the Commissioner of the Revenue "by deducting from the aggregate of petitioner's capital, surplus and undivided profits amounting to \$1,441,293.97, the assessed value of its real estate, amounting to \$111,050.00 and the indebtedness owed by certain of its stockholders as principal debtors, aggregating \$11,321.86," (Record, p. 10), and in this connection it was further alleged:

"And petitioner further alleges that afterwards, to-wit, in June, 1915, said Commissioner of the Revenue, as required by section 18 of the said Revenue Bill as then amended and in force, delivered to petitioner a copy of said assessment list and said City of Richmond demanded of petitioner the payment of said erroneous and illegal tax so assessed against it and that thereupon petitioner, to escape the penalties that it would have incurred by its failure or refusal so to do, was compelled to pay and did, in fact, pay said tax to said City of Richmond, one moiety thereof, amounting to \$9,244.66, on the 17th day of June, 1915, and the other moiety thereof, amounting to \$9,244.66, on the 22nd day of December, 1915.

"And petitioner avers that the levy and assessment of the tax of the said City of Richmond hereinbefore mentioned and complained of was illegal and erroneous in this that said tax, instead of being levied and assessed by said City of Richmond against the shareholders of petitioner upon the value of the shares of stock held by them respectively, was levied and assessed by it *in solido* against petitioner itself upon the aggregate of its capital, surplus and undivided profits, less the deductions therefrom hereinbefore mentioned and as so levied and assessed, was a tax upon the capital of petitioner contrary to section 5219 of the Revised Statutes of the United States and likewise contrary to the following statutes of Virginia then in force, to-wit: section 1040-a of the Code of Virginia, Pollard's Edition, 1904; section 17 of the Revenue Bill of April 16, 1903, as said section was amended and re-enacted by an act approved March 12, 1908, and as further amended and re-enacted by an act approved January 30, 1912 (chapter 15 of the Acts of the General Assembly of Virginia for the year 1912 at page 18); section 18 of said Revenue Bill, as said section was amended and re-enacted by said act approved March 12, 1908 (chapter 213 of the Acts of the General Assembly of Virginia for the year 1908, pp. 325-326); and section 19 of said Revenue Bill (chapter 148 of the Acts of the General Assembly of Virginia for the session of 1902-1903-1904, p. 164.)

"And petitioner, while insisting that said tax was levied

and assessed by said City of Richmond directly against petitioner upon its capital as hereinbefore alleged, nevertheless avers that, even if said tax should be held to have been in effect levied and assessed against the shareholders of petitioner on the value of their shares in the manner prescribed in sections 17 and 18 of the Revenue Bill as then amended and in force, such levy and assessment of said tax was illegal and erroneous in this that it violated section 1040-a of the Code of Virginia above mentioned and particularly that part of section 1040-a which, in permitting the said City of Richmond, in common with other cities and counties of the State, to tax the shares of the capital stock of such banks, national and State, as were located within its corporate limits, expressly restricted said City to the same rate of taxation upon such shares as should be assessed by it upon other moneyed capital in the hands of individuals residing in said city. And thereupon petitioner says that, while the said City of Richmond, in and for the year 1915, levied and assessed upon the capital of petitioner or upon the value of its shares representing same the tax above mentioned, at the rate of \$1.40 on the \$100, and collected the amount thereof, to-wit, \$18,489.20, from petitioner as aforesaid, it levied by its ordinance above mentioned and caused to be assessed and collected, in and for the same year, 1915, the comparatively insignificant tax of only 30 cents on the \$100 upon the value of all intangible personal property within its jurisdiction less the indebtedness of the owners thereof; although said intangible personal property consisted, inter alia, of bonds, notes, evidences of debt and other choses in action of the value of many millions of dollars and represented 'other moneyed capital in the hands of individuals' residing in said City of Richmond, within the sense and meaning of said section 1040-a; thus grossly discriminating against the capital of petitioner and its shares of stock representing same in favor of other moneyed capital in the hands of individuals residing in said City of Richmond, in flagrant disregard of the express prohibition contained in said section 1040-a." (Record, pp. 10-11.)

And further on in said petition made the following allegation:

"And petitioner also avers that, being a National Banking Association, it was an agency of the Federal Government, and as such could not itself, nor could its shares in the hands of its shareholders, be legally taxed directly or indirectly by the State of Virginia or any subdivision thereof except in the manner and to the extent authorized by section 5219 of the Revised Statutes of the United States, which, withholding altogether permission to tax such National Banking Associations on their capital or otherwise, authorized and empowered the States and the subdivisions thereof to levy and assess taxes only against the shareholders thereof upon the value of their shares in such institutions, subject, however, to the express condition that such taxes should not be at a greater rate than were assessed upon other moneyed capital in the hands of individual citizens of said States respectively." (Record, p. 12.)

And in concluding the petitioner said:

"That it is aggrieved by said illegal and erroneous assessment by said City of Richmond of its said tax of \$1.40 on the \$100 and of the collection of the same from petitioner, amounting to \$18,489.20, and, applying for relief under section 571 of the Code of Virginia as at present amended, prays that said City of Richmond be made a party defendant to this petition and that a copy thereof be served up it; that said illegal and erroneous assessment be corrected so as to conform to the law and that so much of said tax as was improperly assessed and collected, to-wit, \$14,527.28, be ordered to be refunded to petitioner by said City of Richmond or its Treasurer; and for general relief.

"And if it shall be held that the assessment by the City of Richmond of its said tax for the year 1915, instead of being against petitioner upon its capital, surplus, and undivided profits, was in fact against its shareholders upon the value of their shares, then in that event petitioner prays

that its petition be treated as an application made by it in behalf of its shareholders for relief against said erroneous and illegal assessment." (Record, p. 14.)

The State statute authorizing the assessment of shares of bank stock, and providing the *modus operandi* of such assessment, is in the following language:

"TAX ON BANKS AND TRUST AND SECURITY COMPANIES.

(As approved April 16, 1903.)

"17. (As amended by act approved January 30, 1912.) No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, nor upon capital of any trust or security company chartered by this State, but the stockholders in such banks, banking associations, trust and security companies shall be assessed and taxed on their shares of stock therein. Each bank, banking association, trust and security company aforesaid, on the first day of February in each year, shall make up and return to the commissioner of the revenue of the county, city or town, or district in which said bank, banking association, trust or security company is located, a report in which shall be given the names and residences of all its stockholders, the number and actual value of the shares of stock held by each stockholder, and the amounts of all bonds, demands and claims owing by each stockholder as principal debtor and not otherwise deducted from his taxable property, but not including any money that may be due on account of the purchase of securities which are non-taxable. With this report there shall be filed the affidavit of each stockholder that the amount of the bonds, demands and claims stated in said report as owing by him as principal debtor is so owing by him as principal debtor, that this amount has not been and will not be otherwise deducted from his taxable property, and that it does not include any money that may be due on account of the purchase of securities, which are non-taxable. From the total value of the shares of stock of any such bank, banking association, trust

or security company, which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted the value of its real estate otherwise taxed in this State, or if the title to the building in which any such bank, banking association, trust or security company does its business, and the land on which it stands, is held in the name of a separate corporation, in which such bank, banking association, trust or security company owns all or a majority of the stock, and such real estate be otherwise taxed in this State, then there shall be deducted from the value of the shares of stock of such bank such proportion of the assessed value of said real estate as the stock it owns in such holding corporation bears to the whole issue of stock in such corporation; and the actual value of each share of stock shall be its proportion of the remainder. In assessing said shares there shall be deducted from the actual value of the shares held by the stockholders the amounts of bonds, demands and claims owing by them as principal debtors and not otherwise deducted from their taxable property, but not deducting any money that may be due on account of the purchase of securities which are non-taxable; provided that such deductions from the assessments of such shares of any bank, banking association, trust or security company shall not in any case exceed 10 per centum of the total actual value of all its shares of stock. Each bank, banking association, trust and security company aforesaid shall at the time it pays the taxes assessed against its shares of stock as aforesaid pay to each stockholder (not as a dividend, but as deducted taxes), such an amount or proportionate amounts, if any, as he may be entitled to by reason of deducting the amounts of the bonds, demands and claims owing by him as aforesaid.

*18. (As amended by act of March 12, 1908.) It shall be the duty of said commissioner of the revenue, as soon as he receives such report, to assess each stockholder upon such actual value of the shares of stock owned by him, less the amount of bonds, demands and claims owing by him as principal debtor and not otherwise deducted from his taxable property, as provided in the preceding section, but not in-

cluding any money that may be due on account of the purchase of securities which are non-taxable, a tax of twenty-five cents on every hundred dollars value thereof, the proceeds of which shall be applied to the support of the government, and a further tax of ten cents on every hundred dollars value thereof, which shall be applied to the support of the public free schools of the State, and he shall make out three assessment lists, give one to the bank, banking association, trust or security company, send one to the auditor of public accounts and retain one. The assessment list delivered to said bank, banking association, trust or security company shall be notice to the bank, banking association, trust or security company, of a tax assessed against its stockholders, and each of them, and have the legal effect and force of a summons upon suggestion formally issued and regularly served. The tax assessed upon each stockholder in said bank, banking association, trust or security company shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, no matter in whose possession found, and have priority over any and all liens by deeds of trust, mortgages, bills of sale, or other assignment made by the owner or holder, and take priority over all liens, by execution, garnishment, or attachment process sued out by creditors of the stockholder. The bank, banking association, trust or security company shall hold the dividend or other fund which belongs to the stockholder and in its custody at the time the assessment list is received, or that thereafter shall come under its control, for the use of the Commonwealth, and apply the same to the payment of the tax assessed, and when thus applied shall be acquitted and discharged from all liability to the stockholder for the money thus disbursed.

"19. Each bank, banking association, trust and security company, on or before the first day of June in each year, shall pay into the treasury the taxes assessed against its stockholders.

"20. Should any bank, banking association, trust or security company fail to pay into the treasury the tax assessed

against its stockholders on or before the first day of June in each year, then as soon thereafter as practicable, the auditor of public accounts shall transmit to the treasurer of the county or city in which said bank, banking association, trust or security company is located, a copy of the assessment list furnished him by the commissioner of the revenue, and it shall be said treasurer's duty to collect the taxes therein assessed and to this end levy upon the stock of the taxpayer, or so much thereof as is necessary to pay said tax, and sell the same at public auction for cash, as other chattels and personal property are sold under execution. He shall give to the purchaser a bill of sale made under his hand and seal.

"21. The bank, banking association, trust or security company, on presentation by a purchaser of his bill of sale shall cause the stock therein described to be transferred to said purchaser, and he shall take a clear and unencumbered title to the stock purchased. Should the taxes assessed against said stockholders be not paid or collected as hereinbefore provided the lists aforesaid shall stand and be treated and have the legal effect of tax tickets regularly made out against each of said stockholders named in said lists as to which tax the right of levy and distress has accrued to the Commonwealth, and the treasurer shall proceed to collect the same by levy or distress, and possess, all and singular, the authority and power conferred upon him by law to collect other State taxes, and be governed by sections six hundred and twenty-two and six hundred and twenty-three of the Code of Virginia.

"22. The bank, banking association, trust or security company, which shall fail or neglect to comply with each and every provision of this act, for each separate offense, shall be fined not less than one hundred nor more than five hundred dollars, which fine shall be recovered upon motion, after five days' notice, in the circuit, corporation, or hustings court of the county or city in which the said bank, banking association, trust or security company is located. Said motion shall be in the name of the Commonwealth and presented by the attorney for the Commonwealth, of the court in which

the motion is brought or made. The real estate of all banks, banking associations, trust and security companies shall be assessed on the land books of the commissioners of the revenue, with the same taxes with which other real estate is assessed." (Acts, 1902-3-4, pp. 163-4; amended Acts, 1908, pp. 325-6; Acts, 1912, pp. 18-19.)

The record shows that this statute was printed on the back of the forms furnished the banks on which they were required to list their stockholders and show their names and residences, leaving to the commissioner of the revenue to apply the rate of taxation on each share of stock, and to extend the same opposite the name of each shareholder. See Exhibit "R" filed with the answer of the City of Richmond (Record, p. 20), together with notat on on said list, "See copy of law on back" immediately in front of the title of the paper which is in the following language, "Bank, Banking Association, Trust or Security Companies, February 1, 1915." See also blank copy of assessment, Exhibit "G" and Exhibit "H," which exhibits are interleaved between pages 44 and 45 of the record, which also upon their face bear evidence that the statute above quoted in full was printed on the back of these papers and that the plaintiff in error in the initiative had filled out and sworn to and again printed on the back of the completed assessment made by the commissioner of the revenue and furnished the bank to guide the payment of taxes to the collector of city taxes.

See also an act of the General Assembly authorizing the assessment and collection of local taxes on shares of bank stock, which is in the following language:

"1040-a. Taxation of shares of stock issued by banks located in counties and cities.--(1) Hereafter each county or city in which any bank, either national or State, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county or city.

"(2) That in so taxing said shares the said county or

city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares.

"(3) Whenever any commissioner of the revenue, before closing his assessment rolls or tax lists, shall receive from the cashier of a bank furnishing a list of the holders of bank stock, as required by law for the purposes of State taxation, or from the owner of any stock mentioned therein, a certificate of the commissioner of the revenue of the county or city of the State in which the owner of such stock lives, stating that certain shares of the stock mentioned in said list are owned by a resident of that county or city, and that the same have been returned for taxation for that year in such city or county, then the said commissioner of the revenue, to whom the said list of the holders of such bank stock has been furnished, shall deduct from the aggregate value of the shares set forth in said list the aggregate value of the shares mentioned in said certificate. The shares owned by non-residents of this State shall be taxed only at the place where the bank issuing the shares is located.

"1010-b. Taxation of shares of stock issued by banks located in towns.—Each town in which any bank, either national or State, is located may tax all the shares of stock issued by such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals.

"In taxing said shares the said town authorities shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares." (Acts of General Assembly of Virginia, extra session, 1902-3-4, pp. 431-432.)

The defendant in error appeared in court and moved the court to dismiss the proceedings on the ground that the plaintiff had no standing in court to make the application under the statutes above quoted on the ground that the assessment complained of was against the stockholders of the bank individually and not against the bank *in solido* as alleged in the petition, and cited as an author-

ity to sustain the motion the case of Main Street Bank against the City of Richmond, 122 Va. 574, but the court, giving effect to the concluding paragraph in the plaintiff's petition above quoted, overruled said motion, and thereupon the defendant in error filed an answer to all of what the defendant in error considered material allegations in said petition, which answer will be found on pages 15-20 of the Record.

Much of this answer relates to questions concerning the proper construction of city ordinances, State statutes and the State Constitution, in the making of which construction no Federal question arose, and therefore such allegations or denials which refer exclusively to them need not be brought to the attention of this Honorable Court.

In response to the allegation that the ordinances of the city, statutes and Constitution of the State were in violation of section 5219 of the Federal statutes concerning the organization and taxation of national banks there was an unqualified denial of such charge, as well as the charge inferentially made that said ordinances, statutes and Constitution were violative of the Constitution of the United States, but concerning the allegation in the petition made as to the number of national banking associations doing business in the City of Richmond and the aggregate amount of capital of said institutions or associations, etc.; the number of State banks and trust companies doing business in the City of Richmond and the aggregate amount of their capital, surplus and undivided profits, etc., and the taxes assessed thereon for the year 1915, and concerning the amount of their intangible personal property, consisting of bonds, notes and other evidences of debt and the tax assessed thereon, all of said allegations were denied, and proof of the existence of the alleged facts was called for, but no such evidence was forthcoming, or attempted even, except the statement made by Thos. B. McAdams, a witness introduced on behalf of the petitioner, which is in the following language:

"Direct examination:

"By Mr. Page—

"Q. Will you kindly state your residence and occupation?

"A. Richmond, Va.; Vice-President of the Merchants National Bank.

"Q. How long have you been connected with the Merchants National Bank?

"A. In an official capacity?

"Q. Yes; in any capacity.

"A. I have been an officer of the bank thirteen years.

"Q. What office do you now occupy?

"A. Vice-President.

"Q. Will you kindly state whether or not money capital in the hands of individuals invested in bonds, notes and other evidences of debt comes in competition with national banks?

"A. Yes.

"Q. Will you kindly explain how this is so?

"By Mr. Pollard: I object.

"By the Court: Objection overruled.

"By Mr. Pollard: Exception.

"A. Our assets are invested in bonds, notes and other evidences of debt. *The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate than a bank can get on a similar investment. In other words, the greater the competition, the lower the rate; the greater the demand the higher the rate.*

"Q. Do the national banks loan money on notes secured by real estate?

"A. You are speaking now with reference to 1915?

"Q. Yes.

"A. Yes; they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds.

"Q. Do you know how much money there was in the hands of individuals in the City of Richmond invested in bonds, notes and other evidences of debt?

"By Mr. Pollard: I object.

"A. No.

"Witness stood aside." (Record, p. 47.)

All of which testimony was objected to by the defendant and the motion made to exclude the same, on such motion the court holding:

"The question is too general. I suppose it will be conceded that part of it would be in competition with national banks, *but the question applied to all and I reserved to you the right to show by testimony that any portion of it might come in competition with national banks and that is still open to you if you can do that; but to illustrate, as I stated this morning and I think all will admit it, if I sell a house for \$20,000 and take notes for the deferred \$15,000 and keep them in my pocket until they mature, it will not necessarily come in competition with national banks, but still at the same time they would be intangibles that could be taxed. Now if you can segregate and tell what portion of these intangible assets will come in competition with national banks the way is open to you. I overrule the motion.*" (Record, p. 48.)

In order to supply the insufficiency of the evidence of this witness, H. E. Tre-non, Commissioner of the Revenue of the City of Richmond, was called and testified as follows:

"That the notes, bonds and other evidences of indebtedness returned and assessed for taxation for the year 1915 amounted to \$6,250,252; that municipal bonds returned and assessed for taxation for the year 1915 amounted to \$981,040.

"That real estate agents who negotiate loans on real estate are required by the State law to take out licenses as private bankers. There were forty-five such real estate agents who took out licenses as private bankers in the year 1915." (Record, p. 48.)

These excerpts from the evidence is all that relates to the alleged discrimination against national banks in violation of said section 5219 of the Revised Statutes of the United States.

Coming now to the judgment of the Hustings Court it will be seen by an examination of the order of the court that the following language is used:

"The court delivered its opinion in writing (which is hereby made a part of the record) declaring that the levy, assessment and collection by the City of Richmond of the tax for the year 1915, in the petition complained of, is illegal and erroneous (1) *because said tax, instead of being levied and assessed against the shareholders of petitioner, upon the value of their shares, ascertained in the manner prescribed by law, was levied and assessed after the ordinance of said city, approved April 9, 1915, had become operative and was in force, and was levied and assessed by and pursuant to the express terms of said ordinance, and as so levied and assessed was a tax in solido directly against petitioner itself upon its capital, surplus and undivided profits less the assessed value of its real estate and other deductions allowed by law, contrary to the express prohibition contained in the Revenue Bill of the State of Virginia then in force, and (2) because instead of being at the legal rate of 30 cents on each \$100 of the assessed value of the shares of petitioner, said tax was levied, assessed and collected at the illegal rate of \$1.40 on each \$100 of such value.*

The court, as will appear, did not pass upon any Federal question. In its opinion the following language is used:

"The arguments of counsel on the questions as to whether the ordinance violates the provisions of section 168 of the Constitution of Virginia with reference to the equality of taxation, or the statutes of this State or of the United States by discriminating unlawfully against bank stocks, and in favor of other moneyed capital, have been able and illuminating, but, in the view I take of the case, a decision of these questions is unnecessary." (Record, p. 27.)

From this judgment of the Hustings Court^{of} the City of Richmond, the City of Richmond asked a writ of error to the Supreme Court of Appeals of Virginia, assigning the following errors to the said judgment of the Hustings Court:

"FIRST: It was error for the court to overrule the motion of the defendant to dismiss the proceedings.

"SECOND: It was error for the court to fix thirty cents on the hundred dollars of value as the maximum rate to be levied by the City of Richmond on shares of bank stock.

"THIRD: It was error for the court, after having determined that the assessment made by the City of Richmond and complained of in the petition was an assessment *in solido* against the Merchants National Bank and not against the stockholders in said bank, to undertake to proceed any further on the application before it, except to order the refund to the Merchants National Bank of the amount paid the City of Richmond in satisfaction of the assessment."

Upon said petition a writ of error was allowed and after full argument the case came on to be heard in said Supreme Court of Appeals of Virginia on March 13, 1919, when the court by his Honor, Judge Stafford G. Whittle, President, held that the said judgment of the Hustings Court was erroneous and ordered the same to be reversed (Record, pp. 49-52), saying at page 49:

"Two assignments of error were pressed. 1. That the court erred in overruling the motion of the city to dismiss the proceedings for want of jurisdiction. 2. In establishing thirty cents on the \$100 of value as the maximum rate that could be levied by the city on shares of bank stock in place of \$1.40."

Concerning the first alleged error the court refused to dismiss the proceedings, holding that the last clause in the petition for the correction, addressed to the Hustings Court of the City of Richmond, heretofore quoted, in which it was asked that if it should appear that the application could only be made by the stockholders, then it was prayed that the petition should be treated as an application made by it in behalf of its shareholders, was

sufficient to justify the court in treating the petition as an application by the stockholders, and therefore the appellate court refused to dismiss said motion, but the court sustained the second ground of alleged error holding that thirty cents on the \$100 of assessed value was not the maximum rate that could be levied by the City of Richmond on shares of bank stock in the place of \$1.40, under the ordinances of the City of Richmond and statutes of the State as construed and enforced under the decisions of the Supreme Court of Appeals of Virginia in the case of *City of Richmond v. Breckry-Hughes Co.*, 122 Va. 178, S. C. 94 S. E. 989, the court going largely into the grounds upon which said decision rested and citing other Virginia cases to sustain its construction (Record, pp. 50-51), and entering an order on March 13, 1919, which is in the following language:

"This day came again the parties by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous.

"It is therefore considered that the same be reversed and annulled and the cause is remanded to the said Hustings Court for further proceedings to be had therewith in conformity with the views expressed in the said written opinion of this court.

"It is further considered that the plaintiff in error recover of the defendant in error its costs by it expended about the prosecution of its writ of error and supersedeas aforesaid here.

"Which is ordered to be certified to the said Hustings Court." (Record, pp. 52-53.)

It is true, however, that in the opinion of the court the learned President used the following language:

"Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of Revised

Statutes of the United States, in that the tax of \$1.40 on the \$100 on the share of bank stock is a higher rate than is assessed upon other 'moneyed capital in the hands of individual citizens of the State.' Obviously the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

"In 9 U. S. Comp. Stat. (1916), title 'National Banks,' at p. 11,993, note 29, it is said: 'Moneyed capital—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase "moneyed capital" used therein means capital engaged in the operations of banking, which is used as a source of profit, so that Act N. Y., July 1, 1882, s. 312, declaring that the stockholders in banks organized under the authority of the State or United States shall be assessed for the value of their stock, was not void under this section, because the assessment roll showed that the securities of life insurance companies, the stock of State corporations, the deposits of savings banks, the stock of trust companies, and companies created outside of the State and owned in the State, virtually escaped taxation, since such property, except that of savings banks and trust companies, was not "moneyed capital in the hands of individuals" as contemplated by this section.' *Mercantile Nat. Bank v. New York* (1887), 121 U. S. 138; *National Bank, etc., v. Boston* (1888), 125 U. S. 69; *Palmer v. McMahon* (1890), 133 U. S. 660; *Talbot v. Board of Commissioners, etc.* (1891), 139 U. S. 438; *First Nat. Bank v. County of Chehalis* (1897), 166 U. S. 440; *New York ex rel Amoskwoy Sav. Bank v. Purdy*, 231 U. S. 373.

"These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of defendant in error that the rate of tax imposed under the segregation act and the ordinance of the city upon the shareholders of bank stock constitute 'a gross and illegal discrimination against that

species of property as compared with all other moneyed capital' is groundless." (Record, pp. 51-52.)

It is submitted, however, that this last quoted language was mere *dicta* and was not to be otherwise treated.

The case being thus remanded to the Hastings Court of the City of Richmond on April 19, 1919, the court entered an order in the following language:

"This day came the parties by their attorneys and it appearing to the court from a mandate certified to this court by the Supreme Court of Appeals of Virginia that the order of this court entered herein on August 3, 1917, has been reversed and annulled by an order of the Supreme Court of Appeals of Virginia entered on the 13th day of March, 1919, which last mentioned order has been duly recorded in the Order Book of this court:

"It is now ordered that the said judgment and order of August 3, 1917, in obedience to the said order of the Supreme Court of Appeals of Virginia, be set aside and annulled, and the court being of opinion that nothing further remains to be done in these proceedings, it is ordered that the application of the plaintiff be rejected and the correction of the alleged erroneous assessment in the petition complained of be refused, and these proceedings be dismissed, and that the defendant recover of the plaintiff its costs about its defense in this behalf expended." (Record, pp. 53-54.)

To the entry of which no objection was made, nor bill of exceptions filed by the plaintiff in error.

From the foregoing detailed and somewhat elaborate statement of the proceedings in the courts below (the Hastings Court of the City of Richmond and the Supreme Court of Appeals of Virginia), we submit that it will appear:

* *That no Federal question was an issue in either of the courts below.*

Adverting again to the opinion of the learned judge of the

Hustings Court and the order of the Appellate Court entered to carry out his views in the premises, it will be seen:

(a) That the first contention made by the City of Richmond in defense of the application was that the court was without jurisdiction to hear the application. The determination of this question turned upon the construction of the statutory relief granted in section 571 of the Code of Virginia hereinbefore quoted. This was clearly not a Federal question, besides it was determined in favor of the plaintiff in error, of which it did not and could not complain. (Record, pp. 24-25.)

(b) The second contention made by the City of Richmond was that the rate of taxation against shares of bank stock upon a proper construction of the Constitution of the State and the statutes and ordinances passed in pursuance thereof was not thirty cents on the hundred dollars, but was one dollar and forty cents on the one hundred dollars. Neither did this contention raise a Federal question dependent, as it obviously was, on the construction of the said statutes and ordinances. This contention in the Hustings Court was sustained, the court expressly declining to place its decision upon any other ground than the one stated. (Record, p. 21.) In an opinion of the learned judge of the Hustings Court it is said:

"The arguments of counsel on the questions as to whether the ordinance violates the provisions of section 168 of the Constitution of Virginia with reference to the equality of taxation, or the statutes of this State or of the United States by discriminating unlawfully against bank stocks, and in favor of other moneyed capital, have been able and illuminating, but, in the view I take of the case, a decision of these questions is unnecessary." (Record, p. 27.)

While it is true that unless the court of original jurisdiction passed upon a Federal question, it cannot be imported into the record by a decision of the Appellate Court (*Marine Bank v. Fulton Co. Bank*, 2 Wallace, 252, 258; *Newcomb v. Wood*, 97 U. S. 581, 583; *Pullman's P. C. Co. v. Central Transportation Co.*, 139 U. S. 62-63), yet in this case the record shows that the Appellate Court, as a matter of fact, went no further than the court below and con-

sidered only "two assignments of error." (Record, p. 49.) For other authorities on this point there are scores of cases cited in 2 Cyc., in the notes on page 661 and *Idem* 678.

It is true that the learned judge of the Supreme Court of Appeals, delivering the opinion of the court, said:

"Adverting briefly to the contention that the construction we are disposed to place upon the segregation act (a State statute) and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States," etc. (Record, p. 51), yet in the order of that Court (Supreme Court of Appeals of Virginia) no such determination is directly or impliedly made concerning the application of section 5219 to the assessment of city taxes on shares of bank stock. Hence no Federal question was thereby adjudicated, for the order of the Supreme Court of Appeals above quoted has no language in it which can justify the conclusion that the court passed upon a Federal question. (Record, pp. 52-53.)

The case of the *Union Bank v. the City of Richmond*, 94 Va. 316, 320, is directly in point. By the third syllabus of that case it was held that alleged errors which are outside of the pleadings and do not appear ever to have been brought to the attention of the trial court will not be considered an error on appeal in the court of appeals. The facts of this case are strikingly like the one under consideration. It was said by the court:

"Other grounds of objection to the tax have been assigned in the petition, and in argument. They are, however, outside of the case made by the pleadings, and there is nothing in the record to show that they were ever brought to the attention of the court below. We can only consider such alleged errors as are involved in the record, and have been considered and passed on by the court below."

citing the *National Bank v. Commonwealth*, 9 Wallace, 353, 359, where it was held that "on a writ of error to a State court no question will be considered here which was not called to the attention of the State court." This case was cited and approved, as were a number of other similar cases in *U. S. v. American*

Bell Telephone Co., 167 U. S., 224, 264. So, likewise, the case of the *Union Bank v. the City of Richmond*, *supra*, on the point under consideration, has been cited and approved in *Sterenson v. Henkle*, 100 Va. 591, 597, the court saying:

"Other grounds of objection to the proceedings culminating in the tax title, and under which the appellee claims, are assigned in the petition, and urged in argument, but they need not be considered for two reasons. First, they are outside of the case made by the pleadings and there is nothing in the record to show that they were ever brought to the attention of the court below. We can only consider such alleged errors as are involved in the record, and have been considered and passed on by the lower court." (*Union Bank v. City of Richmond*, 94 Va. 320.)

In the light of these authorities and others that might be cited, we feel justified in reiterating that it is well settled that, if a case can be and is decided without passing on any Federal question, there is no jurisdiction in this court to review the decision of the State court, and this is true even though the State court, in addition to deciding the case on a non-Federal question, goes further and also passes on a Federal question.

Mr. Justice Matthews, in *De Saussure v. Gaillard*, 127 U. S. 216, at pp. 232-233, says:

"It thus appears that in point of fact the Supreme Court of the State of South Carolina in its opinion in this case passed upon the Federal question sought to be raised by the plaintiff as the foundation of his case, and decided it adversely to him; but the analysis of the case which we have made shows clearly that the decision of that question was not necessary to the judgment. Before reaching that question, the Supreme Court had already decided that the action of the plaintiff could not be sustained, according to the meaning of the provisions of the statute under which it was brought. The decision of that point was final, and was fatal to the plaintiff's right of recovery. That question is not a

federal question; it does not arise under the Constitution of the United States, or of any law or treaty made in pursuance thereof. It is not a question, therefore, which under this writ of error, we have a right to review. . . .

"It is a well settled rule, limiting the jurisdiction of this court in such cases, that 'where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.' *Klinger v. Missouri*, 13 Wall. 257, 263, per Mr. Justice Bradley. And it has been repeatedly decided, under section 709 of the Revised Statutes, that to give this court jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

In *Norton v. Whiteside*, 239 U. S. 144, Mr. Chief Justice White, at page 153, said:

"Coming to test these averments we fail to perceive any ground for holding that the rights asserted rested in any degree whatever upon a substantial claim under the Constitution or laws of the United States or by any possibility involved the construction or application of any law of the United States for the following reasons: First, because as to the claim of riparian rights on the navigable waters in question it was long since affirmatively settled that such claim solely involves a question of State law and therefore at the time the bill was filed it was not open to contend to the contrary."

The two last cases cited were quoted to sustain a similar motion made by the defendants in error in the case of *Old Dominion Iron and Nail Works v. Chesapeake and Ohio R. R. and the City of Richmond*, 242 U. S. 623, and said motion was granted, this Honorable Court citing without an opinion a number of pertinent cases fully sustaining the motion, and we now cite a more recent case, that of *Jefferson C. Powers v. the City of Richmond*, where, although fully argued and submitted upon its merits, the court, *ex mero motu*, speaking by the Chief Justice, dismissed the writ of error "for want of jurisdiction," upon the authority of *Castillo v. McConico*, 168 U. S. 674. See U. S. Supreme Court Advanced Opinions, 1919-20, p. 199 (not yet officially reported.)

In the case cited by the Chief Justice, the court said at page 683:

"When, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the State interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. *Pittsburg, Cincinnati, C. & St. L. Ry. Company v. Backus*, 154 U. S. 421; *Kentucky Railroad Tax Cases*, 115 U. S. 322; *Davidson v. New Orleans*, 96 U. S. 97."

Adverting to the petition for writ of error to this Honorable Court, it will be seen that the grievance which the plaintiff in error proposed to bring to the attention of this court was the "refusing a writ of error to the final judgment and order of the Hustings Court of the City of Richmond in the above entitled proceedings, and also considering itself aggrieved by the final order and judgment of the Hustings Court of the City of Richmond in said proceedings, the Merchants National Bank of Richmond, Virginia, hereby prays a writ of error from the said decision and judgment of the Supreme Court of Appeals of Virginia and from the said judgment and order of the Hustings Court of the City of

Richmond to the Supreme Court of the United States." (Record, p. 56.)

On pages 57-60 will be found the assignment of errors and upon an examination of these it will be seen that each of them attempts to place its grievance upon the violation of section 5219 of the United States Revised Statutes, whereas, as hereinbefore shown, neither the Hustings Court of the City of Richmond (the court of original jurisdiction), nor the Supreme Court of Appeals of Virginia, so far as the record shows, passed upon the question as to whether said ordinances were violative of anything contained in said statute.

In this situation, and in view of the said petition and on the foregoing authorities, it is submitted that the record does not involve any Federal question, and for that reason this Honorable Court is without jurisdiction and the said writ of error should be dismissed.

SECOND

These proceedings should be dismissed or affirmed because it is manifest that the appeal is taken for delay only, and that the questions on which the decision of the case depends are so frivolous as not to need further argument.

An examination of each of the eight assignments of error found on pages 57 to 60 of the record will show that, in effect, the gravamen of the complaint of the plaintiff in error is that the ordinances under which the tax against shares of bank stock was assessed are violative of the Constitution of the United States and of section 5219 of the Revised Statutes of the United States.

The arguments hereinbefore set forth and the authorities cited to sustain the same, in a large degree, are applicable to the contention now presented under this head, but in addition thereto we wish to call the attention of the court to the following:

In *Watson v. United States*, 9 Wheaton 651, 657, it was laid down as a settled principle

"that no bill of exception is valid which is not for matter excepted to at the trial," and that "it has always been considered that a bill of exception is restricted to matters of exception taken pending the trial and ascertainment, before verdict."

Again in *Ex Parte Crane*, 5 Peters, 190, 199, citing 2 Blackstone, 372, it is said:

"If either in his directions or decision he (the judge) mistakes the law, by ignorance, inadvertence or design, the counsel on either side may require him publicly to seal a bill of exceptions stating the point wherein he is supposed to err."

In the case of *Pomroy's Lessee v. Bank*, 1 Wallace 592, 600, Mr. Justice Clifford said:

"But when a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequence of his neglect or oversight."

In *Insurance Company v. Treasurer*, 11 Wallace 204, Mr. Justice Bradley held that

"although this court had since decided the tax to be illegal, *yet as it did not appear by the record that the State court passed on the legality or illegality of the tax, but might have decided the case on the construction of a State statute, this court had no jurisdiction to review the decision of the State court.*"

In *Commercial Bank v. Rochester*, 15 Wallace 639, 642, Mr. Justice Miller said:

"It has been so often held by this court that the question on which the plaintiff in error relies to give jurisdiction must have been decided by the State court that it has become one of the settled principles on that subject."

In *Steines v. Franklin County*, 14 Wallace 15, it was held:

"That the decision of the highest court of a State in granting or refusing to grant a motion for a re-hearing in an equity suit is not re-examinable in this court under any writ of error which the court can issue to review the judgment or decree of the State court."

See specially what is said on this subject by Mr. Justice Clifford on page 22. This decision is specially pertinent in this case for the reason that each of the assignments of error refer to the determination made by the Supreme Court of Appeals of Virginia not to rehear the last decision of the Hustings Court of the City of Richmond. In so doing the Supreme Court of Appeals of Virginia by its order entered on its records on the 25th day of November, 1919, certified that it had

"maturely considered the application for the correction of the alleged erroneous and improper assessment of taxes against the Merchants National Bank by the City of Richmond and the transcript of the record of the judgment aforesaid and the arguments of counsel and was of opinion that the said judgment is *plainly right, doth reject said petition and refuse said writ of error and supersedeas.*" (Record, p. 54.)

In *Storm v. United States*, 94 U. S. 76, 81, it is said:

"Parties dissatisfied with the ruling of a subordinate court, and intending to seek a revision of the same in the appellate court, must take care to raise the questions to be re-examined, and must see to it that the questions are made to appear in the record; for nothing is error in law except what is apparent on the face of the record by bill of exceptions, or an agreed statement of facts, or in some one of the methods known to the practice of courts of error for the accomplishment of that object."

See also *Weed v. Crane*, 154 U. S. 570 and *Bank v. Caldwell*, Idem, 592.

In *Glenn v. Fant*, 134, U. S. 398, 400, Chief Justice Fuller uses the following language:

"It is impossible for us to regard this stipulation (one found in the record) as taking the place of a verdict of a jury or a special finding of facts by the court upon which our jurisdiction can properly be invoked to determine the questions of law thereby raised."

In *Selover v. Walsh*, 226 U. S. 112, it is held:

"Federal questions not raised in a court below cannot be reviewed in the Federal Supreme Court on writ of error to a State court."

In *Baltimore & Potomac Rd. Co. v. Trustees*, 91 U. S. 127, it was held that matters of parol evidence can never be made a part of the record so as to become re-examinable in a court of errors unless it be by one of four ways: (1) By agreed statement of facts; (2) By bill of exceptions; (3) By special verdict; (4) By demurrer to the evidence.

In this case Mr. Justice Clifford says on page 130:

"Exceptions may be taken by the opposite party to the introduction of depositions or affidavits; and the party introducing such evidence in a subord'nate court may insist that the court shall give due effect to the evidence, and, in case of refusal to comply with such a request, may except to the ruling of the court, if it be one prejudicial to his rights. Where neither party excepts to the ruling of the court, either in respect to its admissibility or legal effect, the fact that such a deposition or affidavit is exhibited in the transcript is not of the slightest importance in the appellate court, as nothing of the kind can ever constitute the proper foundation for an assignment of error."

And again on page 131 the learned justice uses the following language:

"Attempt is made to overcome that difficulty by the suggestion that the writ of error is addressed to the judgment, and that the office of the writ is to remove the judgment of the subordinate court into this court for re-examination, which is undoubtedly correct; but it is equally true, that, if the transcript does not show that any error exists in the record, the judgment must in all cases be affirmed, except where it appears that there has been a mistrial. *Minor v. Tillotson*, 1 How. 287; *Taylor v. Morton*, 2 Black 484; *Barnes v. Williams*, 11 Wheat. 415; *Carrington v. Pratt*, 18 How. 63."

In *Laber v. Cooper*, 7 Wallace 565, it was held:

"The overruling of a motion for a new trial cannot be made the subject of review by the court."

In this connection we suggest that the petition for writ of error to the last judgment of the Hastings Court was nothing more nor less than a motion for a new trial, or an application for a rehearing, from which it necessarily follows that the refusal of the court to grant the relief prayed for in said petition was not error and cannot be considered as such in this court.

In *Walker v. Sauvinet*, 92 U. S. 90, 93, Mr. Chief Justice Waite said:

"Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

"The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below."

In *James v. Bank*, 7 Wallace 692, 693, the Chief Justice, delivering the opinion of the court, said:

"The regular course, in cases of this description, is to

affirm the judgments. The appeal is regularly here and cannot be dismissed for want of jurisdiction. The motion, therefore, must be denied."

On the question of whether the court in this case should dismiss the writ of error for want of jurisdiction or affirm the order of the Supreme Court of Appeals of Virginia in refusing the writ of error, this case is direct authority, and shows that where error does not appear by bill of exceptions or otherwise that the court should affirm the judgment of the court below.

In the same connection we beg to cite the case of *Gatewood v. Randall*, 111 U. S. 775. There Chief Justice Waite, delivering the opinion of the court said:

"This judgment is affirmed. The record fails entirely to present, in proper form, any of the questions which have been argued for the plaintiff in error."

See on this point also *Metropolitan Ry. Co. v. Macfarland*, 195 U. S. 322.

For other cases on the proper disposal of a motion to affirm or dismiss see *Rickman v. Bergholz*, 131 U. S. Appendix, p. cxliii; *Force v. McVeigh*, 131 U. S. Appendix, p. cxlii; *Louisville Co. v. Woodson*, 134 U. S. 614; *First Nat. Bank v. Anderson*, 172 U. S. 573; *Abbott v. Tacoma*, 175 U. S. 409; *Whitcomb v. Smithson*, 175 U. S. 635; *N. Y., Etc., R. Co. v. Bristol*, 151 U. S. 556; *Connecticut v. Woodruff*, 153 U. S. 689; *Wheeler v. New York*, 178 U. S. 321; *McNulta v. Lockridge*, 141 U. S. 327; *Chanute City v. Trader*, 132 U. S. 210; *Richardson v. Louisville*, 169 U. S. 128; *Blythe v. Hinckley*, 180 U. S. 333; *Equitable Life v. Brown*, 187 U. S. 308; *Chicago v. Newell*, 198 U. S. 579; *Evans v. Brown*, 109 U. S. 180.

Another very recent case bearing upon this question is *Godchaux Co. v. Albert S. Estopinal, Jr., Sheriff, etc.*, decided December 22, 1919, reported in *Advance Opinions of United States Supreme Court, 1919-1920*, pp. 136, 137. There Mr. Justice McReynolds, delivering the opinion of the court, uses the following language:

"The settled rule is that, in order to give us jurisdiction

to review the judgment of a State court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and further, that if presented in a petition for a rehearing, it comes too late unless the court actually entertains the petition and passes upon the point. *Mutual Life Ins. Co. v. McGraw*, 188 U. S. 291; *St. Louis & S. F. R. Co. v. Shepherd*, 240 U. S. 240, *Missouri, Etc., Co. v. Taber*, 244 U. S. 200.

"The writ of error is dismissed."

The Chief Justice concurring uses the following language:

"The Chief Justice concurs in the result solely on the ground that, as the court below exerted jurisdiction and decided the cause—by the judgment to which the writ of error is directed—that contention that a Federal right was violated by the refusal of the court to take jurisdiction is too unsubstantial and frivolous to give rise to a Federal question."

In the case of *St. Louis S. F. Co. v. Shepherd*, 240 U. S. 240, 242, cited in the case last above mentioned, Mr. Justice McReynolds concludes his opinion with the following language:

"No exception was reserved to this instruction, no modification of it was suggested and no other instruction upon the subject was suggested. It is therefore apparent that the assignments based upon this statute are so devoid of merit as to be frivolous."

For the sake of the argument only it may be admitted that the Supreme Court of Appeals of Virginia in its opinion did determine a Federal question which was insisted upon in the original petition of the plaintiff in error to the Hustings Court of the City of Richmond to correct an alleged assessment of city taxes on its bank *in solido* by declaring in its opinion, after citing a number of cases, that such contention was "*groundless*" (Record, pp. 51-2), yet it is indisputable that said question was not necessary for the decision of the court, for the obvious reason, as argued in the brief

of counsel for the defendant in error in that court, on pages 13 and 14 of the reply brief which that court had before it at the time that "If a case can be finally determined upon a question other than a constitutional one the court must rest its judgment on such question and determine the case only upon non-constitutional grounds," citing *Board of Supervisors of Henrico County v. Commonwealth*, 116 Va. 311, in which case the learned judge delivering the opinion of the court, to sustain his proposition, cited 2d Brock., pp. 448-49, 678-79, two other Virginia cases and Cooley on Constitutional Limitations, 6th ed., p. 196, to which citations we beg to add the following cases, viz.: *Bridge Co. v. Warren*, 11 Peters, 420; *R. Co. v. Wellman*, 143 U. S. 339, 445, and *Baker v. Grice*, 169 U. S. 284, 292.

It is reasonable to suppose, if not a positive conclusion, drawn from the situation confronting the Supreme Court of Appeals of Virginia, that, guided by these authorities, it felt bound to avoid the determination of the Federal question which the counsel for the plaintiff in error sought to have determined and sustaining the error assigned as to the assessment being against the bank *in solido* remanded the case to the Hustings Court of the City of Richmond for final determination. When that determination was made the plaintiff in error undoubtedly had its opportunity to object to the entry of the order made by the Hustings Court and if its objection was not heeded to except to the ruling. Neither of which, as hereinbefore pointed out, did it do. Now to attempt to avoid such omission is "unsubstantial and frivolous and cannot give rise to a Federal question." Per Chief Justice White in *Godchaux v. Eastopinal*, *supra*.

It seems proper that the contention of this Honorable Court should be called to an error into which the plaintiff in error has fallen in its petition addressed to the Supreme Court of Appeals of Virginia seeking to reopen the questions that were determined by the decision of that court in granting substantially the relief asked for by the petition of the City of Richmond. This petition of the plaintiff in error will be found on pages 1 to 9 of the record. On page 2 it is stated that the Supreme Court of Appeals,

"Without passing on the question as to whether or not

the tax complained of was assessed directly against the petitioner upon its capital, surplus and undivided profits, and without construing the ordinance under the pretended authority of which the tax complained of was assessed,"

simply reversed the order of the Hastings Court. By reference to the petition of the City of Richmond to the Supreme Court of Appeals of Virginia, praying an appeal from the order of the Hastings Court, it will be seen that three errors were assigned relating to the holding of the court:

(1) That the court below was in error in not dismissing the proceedings because they were brought in the name of the Merchants National Bank rather than in the name of the stockholders themselves. (Record, in case of *City of Richmond v. Merchants National Bank* in the Supreme Court of Appeals of Virginia, p. 10.)

(2) That it was error for the court to fix thirty cents on the hundred dollars of the value as the maximum rate to be levied by the City of Richmond on shares of bank stock. (*Idem*, p. 13.)

(3) It was error for the court, after having determined that the assessment by the City of Richmond and complained of in the petition was an assessment *in solido* against the Merchants National Bank and not against the stockholders in said bank to undertake to proceed any further on the application before it except to order the refund to the Merchants National Bank of the amount paid the City of Richmond in satisfaction of the assessment. (*Idem*, p. 44.)

Unfortunately this petition, which as we understand, was properly a part of the record of the writ of error now pending, was, for some mistake or some reason unknown to us, omitted from the original record as printed and filed, but is now proposed to be added under stipulation of counsel.

In this connection we wish to say that on page 2 of the record in the pending case a further statement is made in the following language:

"In the brief filed at the former hearing before this court and in the oral argument, the repugnancy between the tax complained of and section 5219 of the Revised Statutes of the United States was insisted upon and argued at length."

Adverting again to the petition addressed by the City of Richmond to the Supreme Court of Appeals of Virginia, to be made ~~by a stipulated~~ part of the record under the said stipulation, it will be seen that the question alleged to have been fully argued (said petition being under the rule of the Supreme Court of Virginia treated as the opening brief) is only incidentally mentioned by the plaintiff in error. As indicated by that paper the reliance of the City of Richmond in asking a reversal related wholly to the assignments of error above stated, which were three in number, and none of these assignments, except incidentally, referred to any Federal question, but were placed wholly upon the court's misconstruction of the Virginia statutes and the ordinances of the City of Richmond. This position of the City of Richmond was well understood by the Supreme Court of Appeals as stated in its opinion, the court saying:

"Two assignments of error were pressed. (1) That the court erred in overruling the motion of the city to dismiss the proceeding for want of jurisdiction. (2) In establishing thirty cents on the \$100 in value as the maximum rate that could be levied by the city on the shares of bank stock in place of \$1.40."

It is true, as indicated above and as hereinbefore stated, that the court said:

"Adverting briefly to the contention that the construction we are *disposed to place* upon the segregation act and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.'" (Italics supplied.)

If this declaration of the court, in connection with the decree of the court reversing the judgment of the Hustings Court, decided any question it was a *moot question* not necessary to be decided, it being the established doctrine declared by this court that a Federal

question should not be determined by a State court when the case can be disposed of on non-Federal grounds.

And furthermore to sustain our view, we beg to quote from the reply brief of the City of Richmond to the brief filed by the counsel for the Merchants National Bank before the Supreme Court of Appeals of Virginia. It is there said:

"From the foregoing it necessarily follows that even though the court may hold that the Hustings Court had jurisdiction to grant relief to the stockholders on the application of the bank, *yet the judgment of the Hustings Court must be reversed and the case sent back to that court to afford it an opportunity to correct its judgment in reference to the limitation upon the rate of taxation on shares of bank stock for the year 1915.*

"When this question shall be determined it will be time enough—indeed, will be the only appropriate time—for the court to consider whether or not the imposition of a tax in excess of thirty cents on the hundred dollars is in violation of section 5219 of the Revised Statutes of the United States or in conflict with the Constitution of this State or of the United States as argued in the brief of the learned counsel for the defendant in error, for it is an elementary principle that if a case can be finally determined upon a question other than a constitutional one, the court must rest its judgment on such question and determine only the case upon non-constitutional grounds. *Board of Supervisors of Henrico Co. et. als v. Commonwealth of Virginia*, 116 Va. 511."

No doubt this suggestion was followed by the court in the entry of its order sending the case back to the Hustings Court in order to afford the plaintiff in error an opportunity to press and bring to an adjudication the Federal question on which it relied. As indicated above it either purposely or inadvertently omitted to avail itself of this opportunity to raise and have adjudicated the Federal question it is now so industriously pressing as a basis for error.

The cases cited by the court to sustain said declaration, viz.: *Mercantile National Bank v. New York* (1887), 121 U. S. 138;

National Bank, etc., v. Boston (1888), 125 U. S. 60; *Palmer v. McMahon* (1890), 138 U. S. 660; *Talbott v. Board of Commissioners, etc.* (1891), 139 U. S. 438; *First National Bank v. County of Chehalis* (1897), 166 U. S. 440; *Amoskeag Sav. Bank v. Purdy* (1913), 231 U. S. 373, are apposite and conclusive against the contention of the plaintiff in error and why these cases should be relied upon for that purpose, may we say, is passing strange. Every one of these cases are, in our judgment, a direct authority against the contention of the plaintiff in error.

For these reasons we submit that the writ of error should be dismissed or affirmed.

GEO. WAYNE ANDERSON,

H. R. POLLARD,

Counsel for Defendant in Error.

March 17, 1920.

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IN THE
Supreme Court of the United States

October Term, 1919.

No. 710.

THE MERCHANTS NATIONAL BANK OF RICHMOND,
VIRGINIA, PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND,
DEFENDANT IN ERROR.

In Error to the Supreme Court of Appeals of Virginia.

REPLY OF PLAINTIFF IN ERROR TO MOTION OF DEFENDANT IN
ERROR TO DISMISS THESE PROCEEDINGS FOR THE
REASON THAT NO FEDERAL QUESTION WAS DE-
CIDED BY THE SUPREME COURT OF APPEALS
OF VIRGINIA, AND, HENCE, THAT THE
WRIT OF ERROR WAS IMPRO-
VIDENTLY AWARDED.

The defendant in error moves this Honorable Court first
to dismiss these proceedings for the reason that no Federal

question was decided by the Supreme Court of Appeals of Virginia.

The rule laid down by Mr. Justice Harlan, and repeatedly reaffirmed in the decisions of this Honorable Court, is as follows:

"It is essential to our jurisdiction in re-examining the judgment of the State court, that the alleged conflict between the State law and the Constitution of the United States appear in the pleadings of the suit, or from the evidence in the course of the appeal, in the instructions asked for, or from exceptions taken to the rulings of the court, or it must be that such a question was necessarily involved in the decision and that the State court would not have given judgment without deciding it."

Home for Incurables v. New York City, 187 U. S. 155-157.

St. Louis Expanded Metal Co., etc., v. Standard Fire-Proofing Co., 195 U. S. 627.

The record in this case shows that the plaintiff in error thus raised the Federal question here involved in its original petition in the trial court, the Hustings Court of the City of Richmond:

"And petitioner also avers that being a National Banking Association, it was an agency of the Federal Government, and, as such, could not itself nor could its shares in the hands of its shareholders be legally taxed directly or indirectly by the State of Virginia or any sub-division thereof except in the manner and to the extent authorized by Section 5219 of the Revised Statutes of the United States, which,

withholding altogether permission to tax such National Banking Associations on their capital or otherwise, authorized and empowered the States and the sub-divisions thereof to levy and assess taxes only against the shareholders thereof upon the value of their shares in such institutions, subject, however, to the express condition that such taxes should not be at a greater rate than were assessed upon other moneyed capital in the hands of individual citizens of said States, respectively."

The opinion of the trial court was in favor of the plaintiff in error here, the court having decided that—

"the assessment by the city for the year 1915 was made under the provisions of the ordinance of April 9, 1915; it was upon the capital, surplus and undivided profits of the Merchants National Bank, and that the said bank has a right to file its petition and be heard in this court on its motion to correct the said assessment;" and, further, that "the petitioner, the Merchants National Bank, should be exonerated from the payment of the taxes assessed by the city of Richmond for the year 1915 upon its capital, surplus and undivided profits, and that the sum thus paid should be refunded to said bank."

Under this state of facts, it did not become necessary for the trial court to pass upon the Federal question set forth in the petition of plaintiff in error here. To show, however, that the Federal question, which was specifically set forth in the petition of the plaintiff in error was raised and argued before the trial court, the following citation is made from the opinion of the trial court:

"The argument of counsel on the questions as to whether the ordinance violates the provisions of Section 168 of the Constitution of Virginia with reference to the equality of taxation, or the statutes of this State or of the United States, by discriminating **unlawfully against bank stocks and in favor of other moneyed capital**, have been able and illuminating, but, in the view I take of the case, a decision of these questions is unnecessary."

It thus appearing that the trial court did not pass on the Federal question, it follows that no assignment of error was or could have been made by the defendant in error on its appeal to the Supreme Court of Appeals of Virginia. It could not assign as error the failure of the trial court to **pass on the Federal question** for the reason that this failure was not prejudicial to the defendant in error. However, although the decision of the trial court was favorable to the plaintiff in error, upon the first hearing of this case in the Supreme Court of Appeals of Virginia the plaintiff in error was entitled under Rule VIII, of the rules of said court, to have that court to pass upon the Federal question involved, having thus brought it to the attention of the court in its brief.

"The Federal question here involved was set forth at length in the petition and application of the defendant in error to the Hustings Court of the City of Richmond and was insisted upon in the argument of the case before that court. That court, however, decided the case in favor of the petitioner without passing upon this point. Defendant in error now

makes this point again and relies and insists upon it."

The Federal question here involved thus appearing in the pleadings in the suit and from the evidence in the course of the trial, in the decision of the trial court and upon the presentation of the case to the Supreme Court of Appeals of Virginia, the latter court in its decision fully considered and disposed of it as follows:

"Advertising briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with Section 5219 of the Revised Statutes of the United States, in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other 'moneyed capital in the hands of individual citizens of the State.' Obviously, the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

"In 9 U. S. Comp. Stat. (1916), title 'National Banks,' at p. 11,993, note 29, it is said: 'Moneyed capital.—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase "moneyed capital" used therein means capital engaged in the operations of banking, which is used as a source of profit, so that Act N. Y., July 1, 1882, s. 312, declaring that the stockholders in banks organized under the authority of the State or United States shall be assessed for the

value of their stock, was not void under this section, because the assessment roll showed that the securities of life insurance companies, the stock of **State corporations**, the deposits of savings banks, the stock of trust companies, and companies created outside of the State and owned in the State, virtually escaped taxation, since such property, excepting that of savings banks and trust companies was not "moneyed capital in the hands of individuals," as contemplated by this section.' *Mercantile National Bank v. New York* (1887), 121 U. S. 138, 30 L. Ed. 895; *National Bank, etc., v. Boston* (1888), 125 U. S. 60, 31 L. Ed. 689; *Palmer v. McMahon* (1890), 133 U. S. 660, 33 L. Ed. 772; *Talbott v. Board of Commissioners, etc.* (1891), 139 U. S. 438, 35 L. Ed. 210; *First Nat. Bank v. County of Cheshalis* (1897), 166 U. S. 440; *New York, ex rel., Amoskeag Sav. Bank v. Purdy* (1913), 231 U. S. 373, 58 L. Ed. 373." (Record, pp. 51-52.)

This case was remanded by the Supreme Court of Appeals of Virginia to the trial court for further proceedings to be had in conformity with the views expressed in the written opinion of that court. Thereupon, the trial court entered an order in obedience to the order and opinion of the Supreme Court of Appeals of Virginia, setting aside and annulling its former order and rejecting the petition of the plaintiff in error for the correction of the alleged erroneous assessment, thus deciding adversely to the plaintiff in error each and every question, including the Federal question, upon which it relied in its petition for a correction of said erroneous assessment of taxes.

The plaintiff in error thereupon presented its petition to the Supreme Court of Appeals of Virginia for a writ of error to this judgment of the Hustings Court of the City of Richmond. In this petition (record, pages 1 to 8, inclusive), the repugnancy between the tax assessed against the plaintiff in error and the Constitution and laws of the United States, and especially Section 5219 of the Revised Statutes of the United States, is presented to the court and insisted upon at length. This petition was denied and the writ of error refused by the Supreme Court of Appeals of Virginia by an order entered on the 25th of November, 1919, which is as follows:

"The petition of the Merchants National Bank of the City of Richmond for a writ of error and super-sedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 19th day of April, 1919, by which the application of the plaintiff for the correction of an erroneous and improper assessment of taxes assessed against it by the City of Richmond upon its capital, surplus and undivided profits for the year 1915 was denied and its petition dismissed, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and super-sedeas, the effect of which is to affirm the judgment of the said Hustings Court." (Record, p. 54.)

Attention is here called to the fact that not only does the above order impliedly and necessarily deny the plaintiff in error the right under the statute of the United States here involved, but the above order, on its face, by refusing

the "application of the plaintiff for the correction of an erroneous and improper assessment of taxes assessed against it by the City of Richmond upon *its capital, surplus and undivided profits*" shows that the tax in question is violative of Section 5219 of the Revised Statutes.

"The respective States would be wholly without power to levy any tax, either direct or indirect, upon National Banks, their property, assets or franchises, were it not for the permissive legislation of Congress. This is embodied in Section 5219, Revised Statutes, which confines the right to tax to the shares of stock in the names of the holders, and the real estate of the bank, and any other tax is void. *Owensboro Nat'l Bank v. Owensboro*, 173 U. S. 664, 449, 43 L. Ed. 550. See, also, *Talbott v. Silver Bow County*, 139 U. S. 438, 443, 35 L. Ed. 210 *Third Nat'l Bank v. Stone*, 174 U. S. 432, 434, 43 L. Ed. 1035; *People v. Weaver*, 100 U. S. 539, 543, 25 L. Ed. 705."

The second point relied upon by the defendant in error for dismissing these proceedings is thus stated in its written notice and motion:

"These proceedings should be dismissed or affirmed because it is manifest that the appeal is taken for delay and the questions on which the decision of the case depends are so frivolous as to need no further argument."

On page 28 of the written notice and motion, its learned author says:

"The argument hereinbefore set forth and the authorities cited to sustain the same in a large decree are applicable to the contention now presented under this head; but, in addition thereto, we wish to call attention of the court to the following."

Then follows a long citation of authorities of identical import with the decisions cited in support of the first point urged for dismissing these proceedings.

It having been shown affirmatively from the record that in every step in the proceedings in this case the plaintiff in error raised and insisted upon the Federal question here involved, to-wit, the repugnancy between the tax imposed and the Constitution and laws of the United States, and especially Section 5219 of the Revised Statutes of the United States, and that this Federal question was presented and passed upon by the trial court and the Supreme Court of Appeals of Virginia on every occasion when any proceedings were had, and thus every requirement of the law to entitle the plaintiff in error to a review of the decision of the Supreme Court of Appeals of Virginia has been met, it is not deemed necessary to further consume the valuable time of this Honorable Court in answering various non-essential points raised by the defendant in error in its notice and motion.

For these reasons, it is respectfully submitted that the writ of error should not be dismissed.

E. WARREN WALL,

LEGH R. PAGE,

Counsel for Plaintiff in Error.

April 12, 1920.



FILED

JAN 4 1921

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 240

MERCHANTS NATIONAL BANK OF RICHMOND,
VA., PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

BRIEF FOR THE DEFENDANT IN ERROR ON THE MERITS,

H. R. POLLARD,
GEO. WAYNE ANDERSON,
Counsel for Defendant in Error.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 240

MERCHANTS NATIONAL BANK OF RICHMOND,
VA., PLAINTIFF IN ERROR,

vs.

THE CITY OF RICHMOND.

BRIEF FOR THE DEFENDANT IN ERROR ON THE MERITS.

CASE STATED.

This is a writ of error granted by the Supreme Court of Appeals of Virginia on the petition of the plaintiff in error to the refusal of the said Supreme Court of Appeals to grant a writ of error to a judgment rendered by the Hustings Court of the City of Richmond on the 19th day of April, 1919, the said Supreme Court of Appeals certifying that the petition for said writ of error had been

"maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas". (Record, p. 54.)

The original proceedings were instituted in the Hustings Court of the City of Richmond by virtue of section 571 of the Code of Virginia, 1887, as amended by an Act of the Legislature approved March 10, 1914, which section is in the following words:

"Sec. 571. Redress against erroneous assessment of levies and local taxes.

"Any person assessed with county or city levies and other local taxes, on lands or other property, aggrieved by any such assessment, may, unless otherwise specifically provided by law, within two years from the first day of September, of the year in which such assessment is made, apply for relief to the circuit or corporation court of the county or city wherein such assessment was made; and thereupon the court shall order that he be exonerated from the payment of so much as is improperly assessed, if not already paid, and if paid, that it be refunded to him by the treasurer, who shall have credit for the same in his settlement; except, that where it is shown to the satisfaction of the court that there has been a double assessment of the same property in any case, one of which assessments is proper and the other erroneous, and that a proper single tax has been paid thereon, but that the erroneous tax has not been paid, the court

may order that the applicant be exonerated from the payment of such erroneous assessments, even though the application be not made within two years as hereinbefore required." (Acts of Assembly of Virginia, 1914, p. 78.)

Though the statute does not require any pleadings in writing but only that notice should be given to the municipal corporation of the institution of the proceedings, the plaintiff in error, however, filed an elaborate petition setting forth its grievance in the matter of the assessment of a local tax upon the shares of stock held by sundry of its stockholders. The *gravamen* of this paper was that a tax of \$18,489.20 had been levied upon said stockholders by the City of Richmond and that the amount so assessed was arrived at

"by deducting from the aggregate of petitioner's capital surplus and undivided profits, amounting to \$1,441,293.97, the assessed value of its real estate, amounting to \$111,050.00, and the indebtedness owed by certain stockholders as principal debtor, aggregating \$11,321.86". (Record, p. 10.)

It was alleged in said petition that the said tax instead of being levied and assessed against the stockholders themselves was levied and assessed *in solido* against the petitioner itself upon the aggregate of its capital, surplus and undivided profits, and was, therefore, a tax upon the capital of the petitioner contrary to section 5219 of the Revised Statutes of the United States and likewise contrary to section 1040-a of the Code of Virginia and of certain statutes of the State cited but not quoted.

It was also alleged that for said year (1915) that the rate of tax assessed as aforesaid was \$1.40 on the \$100.00 instead of at the rate of \$0.30 on the \$100.00 as required by the statutes of the State in force for that year, and in connection with this charge it was further alleged that other "moneyed capital in the hands of individuals" residing in the City of Richmond, within the sense and meaning of section 1040-a were only assessed at said rate of \$0.30 and that such assessment so made was

"grossly discriminating against the capital of petitioner and its shares of stock * * * in flagrant disregard of the express prohibition contained in said section 1040-a". (Record, p. 11.)

Concluding said petition in the following language:

"And if it shall be held that the assessment by the City of Richmond of its said tax for the year 1915, instead of being against petitioner upon its capital, surplus, and undivided profits, was in fact against its shareholders upon the value of their shares, then in that event petitioner prays that its petition be treated as an application made by it in behalf of its shareholders for relief against said erroneous and illegal assessment". (Record, p. 14.)

The City of Richmond appeared in court by counsel and moved the court to dismiss the proceedings on the ground that the plaintiff had no standing in court to make said application for redress, for the reason that the application was not an application of the stockholders but

an application of the bank itself, and to sustain this motion cited the case of *Main Street Bank vs. City of Richmond*, 122 Va. 574, 578, holding that an assessment of taxes upon shares of stock cannot be corrected upon the motion of the bank, but the Hustings Court giving effect to the last quoted paragraph of said petition overruled said motion, and thereupon the City of Richmond filed its answer to the said petition denying practically every material allegation thereof. (Record, pp. 15-20.)

On August 1, 1917, the Hustings Court filed a written opinion overruling the motion of the City of Richmond to dismiss the said petition on the ground hereinbefore stated, and held that it had jurisdiction to correct the said assessment by limiting the rate of tax to \$0.30 instead of \$1.40, thus overruling the contention of the plaintiff in error that the assessment was an assessment *in solido* against the surplus and undivided profits of the bank (Rd., pp. 22-27); and thereupon entered an order in conformity with said opinion (Rd., pp. 21-22), to the entry of which order the City of Richmond objected and excepted and subsequently filed its bills of exception Nos. 1, 2 and 3 (Rd., pp. 27, 28 and 48), and by bill of exception No. 2, made a part of the record, all of the evidence adduced before the court upon the hearing of the said motion was copied and made a part of the record from page 29 to 48.

From this judgment of the Hustings Court, the City of Richmond filed a petition addressed to the Judges of the Supreme Court of Appeals of Virginia praying a writ of error and supersedeas to the said judgment, which

petition however was not copied and made a part of the record in this court as it should have been, but by stipulation was subsequently, on March 13, 1920, made a part of the record, and thereupon a writ of error and supersedeas was allowed by said Court of Appeals and said cause was duly docketed in said court. Concerning the assignments of error made and argued in the Supreme Court of Appeals of Virginia, that court uses the following language:

“Two assignments of error were pressed:

1. That the court erred in overruling the motion of the City to dismiss the proceedings for want of jurisdiction.

2. In establishing \$0.30 on the \$100.00 of value as the maximum rate that could be levied by the City on shares of bank stock in the place of \$1.40.” (R., p. 49.)

On March 13, 1919, the court, by Judge Stafford G. Whittle, President, unanimously held that the Hustings Court did not err in taking jurisdiction of the case but further held that the said Hustings Court erred in fixing the rate of \$0.30 as the maximum rate which could be levied by the City of Richmond upon bank stock, following the decision of that court in the case of the *City of Richmond vs. Drewry-Hughes & Co.*, 122 Va. 178, S. C. 74, Southeastern Reporter 989, and by an order of said court the case was remanded to the Hustings Court “for

further proceedings to be had therein in conformity with the views expressed" in said written opinion (Record, pp. 52-53).

Following which, the said Hustings Court on April 19, 1919, entered an order in the words and figures following:

"This day came the parties by their attorneys and it appearing to the court from a mandate certified to this court by the Supreme Court of Appeals of Virginia that the order of this court entered herein on August 3, 1917, has been reversed and annulled by an order of the Supreme Court of Appeals of Virginia entered on the 13th day of March, 1919, which last mentioned order has been duly recorded in the Order Book of this Court.

"It is now ordered that the said judgment and order of August 3, 1917, in obedience to the said order of the Supreme Court of Appeals of Virginia be set aside and annulled, and the court being of opinion that nothing further remains to be done in these proceedings it is ordered that the application of the plaintiff be rejected and the correction of the alleged erroneous assessment in the petition complained of be refused, and these proceedings be dismissed, and that the defendant recover of the plaintiff its costs about its defense in this behalf expended". (Record, pp. 53-54.)

On November 25, 1919, the plaintiff in error presented to the President of the said Supreme Court of Appeals of Va., a petition praying a writ of error and supersedeas to the said last mentioned judgment of the Hust-

ings Court, but said court rejected said petition and refused said writ of error and supersedeas and entered the following order:

“The petition of the Merchants National Bank of the City of Richmond for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 19th day of April, 1919, by which the application of the plaintiff for the correction of an erroneous and improper assessment of taxes assessed against it by the City of Richmond upon its capital, surplus and undivided profits for the year 1915, was denied and its petition dismissed, having been maturely considered and the transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Hustings Court.” (Record, p. 54.)

and thereupon the plaintiff in error filed its petition for a writ of error to this Honorable Court alleging that it was aggrieved by the final order and judgment of the Hustings Court of the City of Richmond in the said proceedings and praying a writ of error

“from the said decision and judgment of the Supreme Court of Appeals of Virginia, and from the said judgment and order of the Hustings Court of the City of Richmond, to the Supreme Court of the United States”.

And on the 30th day of December, 1919, the Hon. Stafford G. Whittle, President of the Supreme Court of Appeals of Va., granted said writ of error, prayed for as aforesaid (Record, p. 56), and with which petition eight assignments of error were filed. (Record, pp. 57-60.)

The learned counsel for the plaintiff in error recognizing the futility of assigning any errors to the said judgments of the Hustings Court and of the Supreme Court of Virginia other than those relating to an adjudication of a federal question, it will be found that all of the eight assignments of error to the said judgments relate practically to one issue, namely: that the assessment and imposition of the tax at the rate of 1.4 per cent upon the shares of stock of the Merchants National Bank was violative of section 5219 of United States Revised Statutes.

Without waiving the motion of the City of Richmond to dismiss for want of jurisdiction or to affirm or dismiss the writ of error of the plaintiff in error submitted on printed briefs to the court on the 19th day of April, 1920, which was on the 26th day of April, 1920, continued for hearing until the October term, 1920, but insisting thereon, we submit the following argument upon the merits of the case:

CASE ARGUED.

FIRST:—The record does not show, as it must affirmatively show, under the decisions of this Honorable Court, that there

is any ground to contend successfully that the taxing laws in force in the City of Richmond at the time of the assessment were violative of section 5219 of United States Revised Statutes. (*Amoskeag Savings Bank vs. Purdy*, 231 U. S. 373.)

Said section is in the following language:

“Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed”.

For the more convenient examination of the statutes of the State of Virginia providing for the taxation of shares of bank stock with those of the State of New York

held to be constitutional and valid on practically the same grounds as those now insisted upon, in the case of *Amoskeag Savings Bank vs. Purdy, Supra*, we beg to insert in parallel columns the statutes of these two States:

EXTRACTS FROM VA. TAX LAWS.

"Sec. 17. (As amended by act approved March 18, 1915.) No tax shall be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, nor upon capital of any trust or security company chartered by this State, but the stockholders in such banks, banking associations, trust and security companies shall be assessed and taxed on their shares of stock therein. Each bank, banking association, trust and security company aforesaid, on the first day of February in each year, shall make up and return to the commissioner of the revenue of the county, city or town, or district in which said bank, banking association, trust or security company is located, a report in which shall be given the names and residences of all its stockholders, the number and actual value of the shares of stock held by each stockholder. From the total value of the shares of stock of any such bank, banking association, trust or security company, which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted the assessed value of its real estate otherwise taxed in this State, or if the title to the building in which any such bank, banking association, trust or security company does its business, and the land on which it stands, is held in the name of a separate corporation, in which such bank, banking association, trust or security company owns all or a majority of the stock, and such real estate be otherwise taxed in this State, then there shall be deducted from the value of the shares of stock of such bank such proportion of the

EXTRACTS FROM N. Y. TAX LAWS.

"Section 7:

"§ 7. When property of nonresidents is taxable.—1. Nonresidents of the state, doing business in the state, either as principals or partners, shall be taxed on the capital invested in such business, as personal property, at the place where such business is carried on, to the same extent as if they were residents of the state."

"Sections 14 and 25:

"§ 14. Place of taxation of individual bank capital.—Every individual banker shall be taxable upon the amount of capital invested in his banking business in the tax district where the place of such business is located, and shall, for that purpose, be deemed a resident of such tax district."

"§ 25. Individual banker, how assessed.—Every individual banker doing business under the laws of this state must report before the 15th day of June under oath to the assessors of the tax district in which any of the capital invested in such banking business is taxable, the amount of capital invested in such banking business in such tax district on the 1st day of June preceding. Such capital shall be assessed as personal property to the banker in whose name such business is carried on."

"Section 21:

"§ 21. Preparation of assessment roll.—They shall prepare an assessment roll containing nine separate columns, and shall, according to the best information in their power set down:

"1. In the first column the names of all the taxable persons in the tax district.

"2. In the second column the quan-

assessed value of said real estate as the stock it owns in such holding corporation bears to the whole issue of stock in such corporation; and the actual value of each share of stock shall be its proportion of the remainder. The owners of the shares of stock of such banks, banking associations, trust or security companies, shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever, provided, that it is declared to be the purpose and intent of this section that when the affairs of any such bank or banking association, or trust or security company are being wound up under the provisions of an act approved March fifteenth, nineteen hundred and twelve, being chapter three hundred and forty-four of the acts of Assembly, nineteen hundred and twelve, entitled an act to amend and reenact section one thousand one hundred and sixty-nine of the Code of Virginia as heretofore amended, the assets of such bank or banking association or trust or security company so being wound up shall continue to be and constitute the capital of such bank or banking association or trust or security company and that no tax shall be assessed thereon as such capital.

Returns of such assets as of February first of each year shall be made up by those having actual custody or control thereof as the same is held and the commissioner of the revenue shall assess the tax thereon against those holding said funds at the rate provided for the taxation of money, and said assessment shall as to such funds be in lieu of all taxes against those beneficially interested therein, but if any surplus shall remain after payment of depositors and creditors in full, such surplus, together with the names and residences of the stockholders and the number of shares owned by them, respectively, shall then be reported by the liquidating officer to the commissioner of the revenue who shall ascertain the fair

tity of real property taxable to each person, with a statement thereof in such form as the commissioners of taxes shall prescribe.

"3. In the third column the full value of such real property.

"4. In the fourth column the full value of all the taxable personal property owned by each person respectively after deducting the just debts owing by him. . . ."

"Section 13:

"§ 13. Stockholders of bank taxable on shares.—The stockholders of every bank or banking association organized under the authority of this state or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes in the tax district where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said tax district or not."

Section 23:

"§ 23. Banks to make report.—The chief fiscal officer of every bank or banking association organized under the authority of this state, or of the United States, shall, on or before the 1st day of July, in each year furnish the assessors of the tax district in which its principal office is located a statement under oath of the condition of such bank or banking association on the 1st day of June next preceding, *stating the amount of its authorized capital stock, the number of shares, and the par value of the shares thereof, the amount of stock paid in, the amount of its surplus and of its undivided profits, if any, a complete list of the names and residences of its stockholders, and the number of shares held by each.* . . . The list of stockholders furnished by such bank or banking association shall be deemed to contain the names of the owners of such shares as are set opposite them, respectively, *for the purpose of assessment and taxation.*"

"§ 24. Bank shares, how assessed.—In assessing the shares of stock of

market value of such surplus assets and assess against each stockholder in such bank, or banking association, or trust or security company, for each year for which no tax on stock has been paid, a proportionate tax on said surplus at the rate and for the purposes prescribed in section 18 of this act; and such tax shall be paid by the liquidating officer into the treasury before any distribution of such surplus to stockholders.

(This section (17), as amended, in force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)

Section 18. (As amended by act approved March 18, 1915.) *It shall be the duty of said commissioner of the revenue, as soon as he receives such report, to assess each stockholder upon such actual value of the shares of stock owned by him a State tax of thirty five cents on every one hundred dollars thereof, of which twenty-five cents shall be applied to the governmental expenses of the State, and ten cents thereof shall be applied to the support of the public free schools of the State as provided by law.*

It shall likewise be the duty of the commissioner of the revenue of each city of the State to assess upon such stockholders a tax, to be levied by the city council or other governing bodies of not exceeding one dollar and fifteen cents on every one hundred dollars value thereof; provided that such city council or governing body may in its discretion direct said commissioners of the revenue to deduct from the value of such shares of stock of such bank for the purpose of local taxation only, the value of any municipal bonds of that particularly municipality held by such bank.

And it shall likewise be the duty of the commissioners of the revenue in the several counties of the State to assess upon each stockholder a tax to be levied by the board of supervisors or other governing body of not ex-

banks, or banking associations, organized under the authority of this state or the United States, the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state. *The value of each share of stock of each bank and banking association, except such as are in liquidation, shall be ascertained and fixed by adding together the amount of the capital stock, surplus, and undivided profits of such bank or banking association, and by dividing the result by the number of outstanding shares of such bank or banking association. The value of each share of stock in each bank or banking association in liquidation shall be ascertained and fixed by dividing the actual assets of such bank or banking association by the number of outstanding shares of such bank or banking association. The rate of tax upon the shares of stock of banks and banking associations shall be 1 per centum upon the value thereof, as ascertained and fixed in the manner hereinbefore provided, and the owners of the stock of banks and banking associations shall be entitled to no deduction from the taxable value of their shares because of the personal indebtedness of such owners, or for any other reason whatsoever. Complaints in relation to the assessments of the shares of stock of banks and banking associations, made under the provisions of this article, shall be heard and determined as provided in §37 of this chapter. The said tax shall be in lieu of all other taxes whatsoever for state, county, or local purposes upon the said shares of stock, and mortgages, judgments, and other choses in action, and personal property held or owned by banks or banking associations, the value of which enters into the value of said shares of stock, shall also be exempt from all other state, county, or local taxation. The tax herein imposed shall be levied in the following manner: The board of supervisors of the several counties shall, on or before the 15th day of Decem-*

ceeding one dollar and fifteen cents on every one hundred dollars of actual value thereof, for county and district and district school purposes, except upon the stock of banks located in incorporated towns in which case the rate shall not exceed forty cents for such purposes; provided the sum to be derived from any such district levy shall be expended by said board only in those districts wherein such bank or banks are located.

And it shall be the duty of the commissioner of the revenue or other assessing officers of the several incorporated towns in which such bank or banks are located to assess upon each stockholder a tax, to be levied by the council or other governing body thereof, of not exceeding seventy-five cents; Provided that such boards of supervisors and councils of towns or other governing body may in their discretion, direct said commissioners of the revenue to deduct from the value of such shares of stock of such bank for purposes of local taxation only, the value of any county or town bonds of said county or town held by such bank. Provided that any incorporated town which does not constitute a separate school district may appropriate the whole or any part of the fund derived from said tax to be used for school purposes in the school district in which said town is located. The said tax shall be in lieu of all other taxes whatsoever for State, county or local purposes upon the said shares of stock said commissioner shall make out three assessment lists, give one to the bank, banking association, trust or security company, send one to the auditor of public accounts and retain one. The assessment list delivered to said bank, banking association, trust or security company, shall be notice to the bank, banking association, trust or security company of a tax assessed against its stockholders, and each of them, and have the legal effect and force of a summons upon suggestion formally issued and regularly served. The tax assessed upon each stockholder in said

ber in each year, ascertain from an inspection of the assessment rolls in their respective counties, the number of shares of stock of banks and banking associations in each town, city, village, school, and other tax district, in their several counties, respectively, in which such shares of stock are taxable, the names of the banks issuing the same, respectively, and assessed value of such shares, as ascertained in the manner provided in this article and entered upon the said assessment rolls, and shall forthwith mail to the president or cashier of each of said banks or banking associations a statement setting forth the amount of its capital stock, surplus, and undivided profits, the number of outstanding shares thereof, the value of each share of stock taxable in said county, as ascertained in the manner herein provided, and the aggregate amount of tax to be collected and paid by such bank and banking association, under the provisions of this article. A certified copy of each of said statements shall be sent to the county treasurer. It shall be the duty of every bank or banking association to collect the tax due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county wherein said bank or banking association is located, and in the city of New York to the receiver of taxes thereof on or before the 31st day of December in said year; and any bank or banking association failing to pay the said tax as herein provided shall be liable by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, and for an additional amount of \$100 for every day of delay in the payment of said tax. Every bank or banking association so paying the taxes due upon the shares of its stock shall have a lien on the shares of stock, and on all property of the several share owners in its hands, or which may at any time come into its hands, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest; and such lien may be

bank, banking association, trust or security company shall be the first lien upon the stock standing in his name and upon the dividends due and to become due thereon, no matter in whose possession found, and have priority over any and all liens by deeds of trust, mortgages, bills of sale or other assignment made by the owner or holder, and take priority over all liens, by execution, garnishment, or attachment process sued out by creditors of the stockholder. The bank, banking association, trust or security company shall hold the dividend or other fund which belongs to the stockholder and in its custody at the time the assessment list is received, or that thereafter shall come under its control, for the use of the Commonwealth, and apply the same to the payment of the tax assessed, and when thus applied shall be acquitted and discharged from all liability to the stockholder for the money thus disbursed.

(This section (18), as amended, in force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)

Sec. 19. (As amended by act approved March 18, 1915.) Each bank, banking association, trust and security company, on or before the first day of June in each year, shall pay into the State treasury and to the treasurer of the several counties, cities and towns, respectively, the taxes assessed against its stockholders.

(This section (19), as amended, in force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)

Sec. 20. (As amended by act approved March 18, 1915.) Should any bank, banking association, trust or security company fail to pay into the treasury the tax assessed against its stockholders on or before the first day

enforced in any appropriate manner. The tax hereby imposed shall be distributed in the following manner: The board of supervisors of the several counties shall ascertain the tax rate of each of the several town, city, village, school, and other tax districts in their counties, respectively, in which the shares of stock of banks and banking associations shall be taxable, which tax rates shall include the proportion of state and county taxes levied in such districts, respectively, for the year for which the tax is imposed, and the proportion of the tax on bank stock to which each of said districts shall be respectively entitled shall be ascertained by taking such proportion of the tax upon the shares of stock of banks and banking associations, taxable in such districts, respectively, under the provisions of this chapter, as the tax rate of such tax district shall bear to the aggregate tax rates of all the tax districts in which said shares of stock shall be taxable, etc."

Footnote to Amoskeag Sav. Bank v. Purdy, 231 U. S., pages 381-386.

of June in each year, then, as soon thereafter as practicable, the auditor of public accounts shall transmit to the treasurer of the county or city in which said bank, banking association, trust or security company is located, a copy of the assessment list furnished him by the commissioner of the revenue, and it shall be said treasurer's duty to collect the taxes therein assessed and to this end levy upon the stock of the taxpayer, or so much thereof as is necessary, to pay said tax and sell the same at public auction for cash, as other chattels and personal property are sold under execution. He shall give to the purchaser a bill of sale made under his hand and seal.

(This section (20), as amended, in force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)

Sec. 21. (As amended by act approved March 18, 1915.) The bank, banking association, trust or security company, on presentation by a purchaser of his bill of sale, shall cause the stock therein described to be transferred to said purchaser, and he shall take a clear and unencumbered title to the stock purchased. Should the taxes assessed against said stockholders, be not paid or collected as heretofore provided, the lists aforesaid shall stand and be treated and have the legal effect of tax tickets regularly made out against each of said stockholders named in said lists as to which tax the right of levy and distress has accrued to the Commonwealth, and the treasurer shall proceed to collect the same by levy or distress, and possess, all and singular, the authority and power conferred upon him by law to collect other State taxes, and be governed by sections six hundred and twenty-two and six hundred and twenty-three of the Code of Virginia.

(This section (21), as amended, in

force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)

Sec. 22. (As amended by act approved March 18, 1915.) The bank, banking association, trust or security company, which shall fail or neglect to comply with each and every provision of this act, for each separate offense, shall be fined not less than one hundred, nor more than five hundred dollars, which fine shall be recovered upon motion, after five days' notice in the circuit, corporation, or hustings court, of the county or city in which the said bank, banking association, trust or security company is located. Said motion shall be in the name of the Commonwealth and presented by the attorney for the Commonwealth, of the court in which the motion is brought or made. The real estate of all banks, banking associations, trust and security companies shall be assessed on the land books of the commissioners of the revenue, with the same taxes with which other real estate is assessed.

(This section (22), as amended, in force ninety days after March nineteenth, nineteen hundred and fifteen, date of adjournment of the General Assembly, until which time this section as it appears in tax laws, nineteen hundred and fourteen, is in force.)"

SECTION 1040a OF THE CODE OF VIRGINIA.

Sec. 1040a. Taxation of shares of stock issued by banks located in counties and cities.—(1) *Hereafter each county or city in which any bank, either national or State, is so located may, subject to the conditions mentioned below, tax all the shares of stock issued by any such bank so located within its limits at the same rate as is assessed upon other moneyed capital in the hands of individuals residing in such county or city.*

(2) *That in so taxing said shares*

the said county or city authorities, respectively, shall follow the mode of assessment and manner of collection prescribed by statute for the collection of State taxes upon said shares.

(3) Whenever any commissioner of the revenue, before closing his assessment rolls or tax lists, shall receive from the cashier of a bank furnishing a list of the holders of bank stock, as required by law for the purpose of State taxation, or from the owner of any stock mentioned therein, a certificate of the commissioner of the revenue of the county or city of the State in which the owner of such stock lives, stating that certain shares of the stock mentioned in said list are owned by a resident of that county or city, and that the same have been returned for taxation for that year in such county or city, then the said commissioner of the revenue, to whom the said list of the holders of such bank stock has been furnished, shall deduct from the aggregate value of the shares set forth in said list the aggregate value of the shares mentioned in said certificate. The shares owned by non-residents of this State shall be taxed only at the place where the bank issuing the shares is located."

3 Va. Code Annotated Supplement 1910, bottom pages 513-514 and p. 786.

While it is true that the plaintiff in error has assigned eight grounds of error, which are found on pages 57-59 of the record, yet it is also true that these assignments are largely argumentative rather than specific and direct, and really present but one issue, which was met and answered by the opinion of the Supreme Court of Appeals of Virginia, where it was said:

"Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict

with section 5219 of Revised Statutes of the United States, in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other 'moneyed capital in the hands of individual citizens of the State'. Obviously the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist.

In 9 U. S. Comp. Stat. (1916), title 'National Banks,' at p. 11,993, note 29, it is said: 'Moneyed capital.—The purpose of this section is to prevent unjust discrimination against United States banks, so that the phrase 'moneyed capital' used therein means capital engaged in the operations of banking, which is used as a source of profit, so that Act N. Y., July 1, 1882, s. 312, declaring that the stockholders in banks organized under the authority of the State or United States shall be assessed for the value of their stock, was not void under this section, because the assessment roll showed that the securities of life insurance companies, the stock of State corporations, the deposits of savings banks, the stock of trust companies and companies created outside of the State and owned in the State, virtually escaped taxation, since such property, excepting that of savings banks and trust companies, was not 'moneyed capital in the hands of individuals' as contemplated by this section.' *Mercantile National Bank vs. New York* (1887), 121 U. S. 138; *National Bank, etc., vs. Boston* (1888), 125 U. S. 60; *Palmer vs. McMahon* (1890), 133 U. S. 660; *Talbot vs. Board of Commissioners, etc.* (1891), 139 U. S. 438; *First Nat. Bank vs. County*

of Chehalis (1897), 166 U. S. 440; *New York, ex rel. Amoskeag Sav. Bank vs. Purdy* (1913), 231 U. S. 373. These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of defendant in error, that the rate of tax imposed under the segregation act and the ordinance of the city upon the shareholders of bank stock constitute 'a gross and illegal discrimination against that species of property as compared with all other moneyed capital,' is groundless." (Record, pp. 51-52.)

If other errors were to be relied upon in that court than the one determined, they should have been in some way brought to the attention of the court while the case was under consideration, by appropriate pleadings. In response to the oft repeated complaint made in the assignment of errors, that the tax was levied and assessed upon the plaintiff's "capital, surplus and undivided profits," it seems sufficient to say that section 5219 does not, in terms or otherwise, limit the mode by which the value of the shares of stock in a bank shall be ascertained. The only limitation, as has often been said by this court, is that the rate shall not be greater than is assessed "upon other moneyed capital in the hands of individuals." As stated above and shown by comparison of the Virginia Statutes with the New York Statutes, the provisions are each practically the same and intended to attain the same end, namely: a fair valuation of the shares of bank stock.

This court, by Mr. Justice Pitney, in the recent case

of *Amoskeag Sav. Bank vs. Purdy, Supra*, quotes and approves what was said by this court, speaking through Mr. Justice Matthews, in the leading case of *Mercantile Bank vs. New York*, 121 U. S. 138, 154, 157:

“The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it

was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under State laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment, and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of State laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and rein-

vested. It includes money in the hands of individuals, employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily, with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank vs. Britton*, 105 U. S. 322: 'The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way'. This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

Concerning the rule of construction thus laid down, Mr. Justice Pitney states that it has been consistently adhered to, citing the following cases:

“*Palmer vs. McMahon*, 133 U. S. 660, 667; *First Nat. Bank vs. Chchalis County*, 166 U. S. 440, 454; *First Nat. Bank vs. Chapman*, 173 U. S. 205, 214; *Commercial Nat. Bank vs. Chambers*, 182 U. S. 556, 560; *Jenkins vs. Neff*, 186 U. S. 230”.

and concludes his observations with this pertinent remark, specially applicable to the situation here:

“According to this practical test, it seems to us that the scheme adopted by the State of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by Sec. 5219, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502).”

Proceeding further, the learned Justice (Mr. Pitney), says:

“As against the owner of bank shares, who, by alleging discrimination, assumes the burden of proving it, and who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous.”

In this connection, Mr. Justice Matthews in the *Mercantile Bank case* says on page 155:

“The main purpose, therefore, of Congress, in fixing limits to State taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals

carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

Thus outlining the forms of stock investments, he further says:

"Applying this rule of construction, we are led, in the first place, to consider the meaning of the words 'other moneyed capital,' as used in the statute. Of course it includes shares in national banks; the use of the word 'other' requires that. If banks shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not

consist in any kind of dealing in money, or commercial representatives of money."

And defining the character of banking business, Mr. Justice Matthews says at page 156:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the bank are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insur-

ance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital."

The issue in the case under consideration must be determined in the light of this definition of the character of business conducted by individuals which may come in competition with the business of national banks.

It is submitted that the record utterly fails to show that "individuals" in the City of Richmond conducted a business of the like nature as that described by Mr. Justice Matthews.

To overcome this situation an abortive effort was made. Thomas B. McAdams, shown to be the Vice-President of the Merchants National Bank, was introduced as a witness on behalf of the plaintiff in error to establish the fact that there was moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of debt now which "comes in competition with national banks" and he stated that there was such moneyed capital, and when asked to explain how this was so, replied:

"A. Our assets are invested in bonds, notes and other evidences of debt. The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate

that a bank can get on a similar investment. In other words, the greater the competition, the lower the rate; the greater the demand, the higher the rate.

"Q. Do the national banks lend money on notes secured by real estate?

"A. You are speaking now with reference to 1915?

"Q. Yes.

"A. Yes, they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds.

"Q. Do you know how much money there was in the hands of individuals in the City of Richmond invested in bonds, notes and other evidences of debt?

"By Mr. Pollard: I object.

"A. No."

After this witness had so testified, the following transpired:

"By Mr. Pickrell: I think it is proper now to put the question to Mr. Tresnon as to the aggregate bonds, notes and other evidences of debt because of the fact that Mr. McAdams has testified that such does come in competition with national banks."

“By the Court: The question is too general. I suppose it will be conceded that part of it would be in competition with national banks but the question applied to all and I reserve to you the right to show by testimony that any portion of it might come in competition with national banks and that is still open to you if you can do that; but to illustrate, as I stated this morning and I think all will admit it, if I sell a house for \$20,000 and take notes for the deferred \$15,000 and keep them in my pocket until they mature, it will not necessarily come in competition with national banks, but still at the same time they would be intangibles that could be taxed. Now, if you can segregate and tell what portion of these intangible assets will come in competition with national banks, the way is open to you.” I overrule the motion.”

By consent of parties, it was entered on the record:

“That the notes, bonds and other evidences of indebtedness returned and assessed for taxation for the year 1915 amounted to \$6,250,252; that municipal bonds returned and assessed for taxation for the year 1915 amounted to \$981,040.00.

That real estate agents who negotiate loans on real estate are required by the State law to take out licenses as private bankers. There were forty-five such real estate agents who took out licenses as private bankers in the year 1915.”

It thus appears that the trial judge (Richardson) recognized the fundamental principle that the plaintiff

in his court carried the burden of proof, and as stated by Mr. Justice Pitney in *Amoskeag Sav. Bank vs. Purdy, Supra*, it was incumbent upon it to show affirmatively that the Virginia statutes on this subject were applicable to the imposition of tax on the bank stock which "discriminates in fact against the holders of shares in the national banks before calling upon the courts to overthrow it", and accordingly held that the plaintiff in error could not claim exemption from the imposition of the local tax at the rate prescribed by ordinance, though he was in error, as the Supreme Court of Appeals of Virginia held, in determining what that rate was, namely, \$.30 instead of \$1.40.

This error grew out of the construction first made by the Supreme Court of Appeals of Virginia of the act of legislature of the State, segregating certain species of property to the State for the imposition of certain taxes and other species of property for the imposition of taxes for the maintenance of the local government of the State, as explained by Kelly, Judge, in the case of *City of Richmond vs. Drewry-Hughes & Co.*, 122 Va. 178, and by Whittle, P., in *City of Richmond vs. Merchants National Bank*, 124 Va. 522, 528, where it was said:

"In conclusion, it is only fair to the learned judge of the Hustings court to state, that on August 3, 1917, when he delivered his judgment in this case, fixing the maximum amount of tax against shareholders of bank stock at thirty cents on the \$100, the first decision of this court in *City of Richmond vs. Drewry-Hughes Co.* was still in

force, and he naturally regarded it as strongly persuasive if not controlling authority in the instant case."

In this connection, we beg to emphasize what was said by the learned President of the court in the last cited case, on page 527:

"Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of Revised Statutes of the United States, in that the tax of \$1.40 on the \$100 on the shares of bank stock is a higher rate than is assessed upon other 'moneyed capital in the hands of individual citizens of the State.' Obviously, the general purpose of the Federal statute is to prevent discrimination by the States in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown from this record to exist."

And we beg also, in concluding the argument under this head, to quote from the case of *Stanley vs. Supervisors of Albany*, 121 U. S. 535, 547, where it was said:

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is: 'That the plaintiff has failed to establish the allegations in said complaint, that the several assessments herein referred to

were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this State.' And the first assignment of error is, that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which is nothing more than that the court below found against the evidence—a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act of March 3, 1865, 13 Stat. c. 86, Sec. 4; Rev. Stat. Sec. 700.

The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered—a matter determinable only in the court below.

To recover in this case, the plaintiff was required to prove, under the decision when the case was first here, that 'the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher, in proportion to their actual value, than other moneyed capital generally.' The court be-

low specially found the negative of this; that the assessors did not, at any of the times in question, habitually or intentionally, or by any rule prescribed by themselves, or by any one whom they were bound to obey, thus assess the shares of national banks."

SECOND:—To maintain that all "notes, bonds and other evidence of indebtedness" held by individuals constitute "moneyed capital" as defined in section 5219 and by the decisions of this Honorable Court cannot be considered within the range of reason.

Mr. Justice Brewer in *Talbott vs. Silver Bow County*, 139 U. S. 438, repeats what was said in *Palmer vs. McMahon*, 133 U. S. 660-667, that "The term 'moneyed capital' ", as used in Rev. Stat., Sec. 5219, respecting State taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals *when the object of their business is the making of profit by the use of their moneyed capital as money,—as in banking, as that business is defined in the opinion of the court.*"

On this same point, Mr. Justice Peckham, delivering the opinion of the court in the case of *First National Bank vs. Ayers*, 160 U. S. 660-668, adverting to the want of proof concerning the use of bonds, notes or other investments by private individuals, uses the following language:

"There is no proof in the case as to the proportion which credits from which such debts may

be deducted bear to the whole amount of the credits owned in the State, nor is there any proof as to what proportion the entire credits owned in the State bear to other moneyed capital owned therein."

The learned Justice, in concluding his opinion in the case laid down this principle: "This court cannot take judicial notice of the relative proportions in which the moneyed capital of a State is invested in the various kinds of securities therein found."

Another case bearing upon the point now under discussion is *First National Bank vs. County of Chehalis*, 166 U. S. 440. Here, again, at page 458, what constitutes a banking business is defined:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus em-

ployed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens."

To the same effect is the case of *National Bank of Commerce vs. Seattle*, 166 U. S. 463, where it was held that:

"The omission from assessment of all moneyed capital in a city owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that invested in incorporated banks located in the city, is not sufficient to make a tax on the shares of stock of a national bank invalid as an unlawful discrimination against the latter, unless the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks."

In *First National Bank of Wellington vs. Chapman*, 173, U. S. 205, 215, it was held that "moneyed capital" as used in section 5219 does not include capital which does not come into competition with the business of national banks. The court, speaking through Mr. Justice Peckham, saying:

"The question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank

shareholder in the assessment upon his bank shares”.

For this reason the claim of the bank, founded on discrimination in violation of section 5219, was rejected. The court saying, at page 218:

“If we were to look at this report (Report of the Auditor of the State) we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals, which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this court, in its decisions above cited, holds is moneyed capital within the meaning of the act of Congress. * * * * * It is impossible to tell from anything appearing in the record what proportion of the whole sum of credits consists of moneyed capital within the meaning of the Federal act.”

It goes without being said that assignments of error cannot be used on an appeal to supply grievances not complained of in the pleadings. We, therefore, call the attention of the court to the language in which the grievances of the plaintiff in error are set forth in its petition presented to the Supreme Court of Appeals of Virginia asking a reversal of the final order of the Hustings Court of the City of Richmond. In that paper, on page 3 of the record, the following appears:

“Thus the Supreme Court of the United States has always held the State taxation of shares of

stock of a National Bank was illegal where it appeared that the State imposed upon such shares a tax at a higher rate than it imposed upon capital in the hands of individual citizens invested in securities similar to those in which the assets of the National Bank was invested. It is held that securities payable upon demand, money loaned at interest, credits, and claims against persons and corporations are the kind of moneyed capital in the hands of individuals within the contemplation of Section 5219 of the Revised Statutes of the United States."

And again on page 8 of the same paper the following:

"It appears from the record, page 50, that the amount of moneyed capital in the hands of individuals listed for taxation in the City of Richmond for the year 1915 was \$6,250,252.00, all of this property was taxed by the City at the rate of thirty (30c) cents on the one hundred dollars and by the State at sixty-five (65c) on the one hundred dollars. It also appears from the record, page 32, that there was in 1915, capital of the National Bank in the City of Richmond the aggregate assessed value of which was \$8,320,521.00 and banks other than National Banks having an aggregate capital the aggregate assessed value of which was \$6,030,294.00. Upon all this capital there was imposed a City tax of \$1.40 on the one hundred dollars and a State tax of thirty-five (35c.) cents on the one hundred dollars.

It thus appears from the record that during the

year 1915 the tax imposed upon the capital, surplus and undivided profits of the petitioner was at a higher rate than on that imposed upon other moneyed capital, in the hands of individual citizens and therefore the said tax was repugnant to Section 5219 of the Revised Statutes of the United States."

These two statements in said petition are all of which the Supreme Court of Appeals of Virginia was apprized that the plaintiff in error complained. We submit that the court cannot fail to see how far short these complaints fall of the limitations placed by the court upon Section 5219 in determining the questions at issue here.

By analogy, the case of *Bradley vs. City of Richmond*, 227 U. S. 477-484, is of import. In that case the plaintiff in error complained of a license tax imposed upon him as a private banker. In the opinion of the court, by Mr. Justice Lurton, it was said:

"Numerous objections to the ordinance and to the tax, arising under the law and Constitution of the State, were decided adversely to the plaintiff in error. With these we have no concern. The case comes here upon the claim made in the State court, and denied, that the ordinance denies both the equal protection of the law and due process as guaranteed by the 14th Amendment."

There the ordinance classifying private bankers imposed a larger tax on those loaning money at a higher rate of interest than other private bankers loaning money

at a lower rate of interest. The Supreme Court of Appeals of Virginia rejected this contention, the court saying:

"It was competent for the council to assign private bankers to different classes, and the plaintiff in error was required to pay no greater license tax than all others in the same class with himself. In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. *Norfolk, &c., vs. Norfolk*, 105 Va. 139. This has not been shown in the present case. On the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax." (110 Va. 521-526.)

In this situation, this Honorable Court, speaking through Mr. Justice Lurton, uses the following language:

"That some private bankers were put into classes which subjected them to less taxation than the class into which the plaintiff in error was placed is the only allegation which would tend to show discrimination. But there was evidence tending to show that the business done by the plaintiff in error and ten other persons or firms was that of lending money at high rates upon salaries and household furniture, while the kind of business done by others in the same general business was the lending of money upon commercial securities.

Obviously the burden was upon the plaintiff in error to show an illegal and capricious classification. The State court said that he had failed to show that these private bankers favored in the classification were doing the same business."

We, therefore, submit that without an adequate charge and in the absence of all evidence to sustain it, it would be a violent presumption to say that all capital represented by "notes, bonds and other evidences of indebtedness" constituted "moneyed capital" as defined in Section 5219, and that all individuals owning such intangibles of necessity were engaged in the banking business and as a consequence such business comes in competition with the business conducted by national banks.

THIRD:—The contention that the assessment complained of was made against the Bank upon its capital, surplus and undivided profits *in solido*, and not against the shareholders upon the value of their shares of stock, cannot be sustained.

Interleaved between pages 20 and 21 of the record is Exhibit R, shown to be a report made in pursuance of Section 17 of Extracts from Virginia Tax Laws, heretofore quoted in full, which shows, as required by said section, the names and residences of all stockholders of the Merchants National Bank, the number and actual value of shares of stock held by each stockholder, and also shows a detailed statement of the process and manner by which the value of each share of stock was ascer-

tained, which, in the making, strictly pursued the statute as indicated in note 2 found at the bottom of said exhibit. This paper was signed by T. B. McAdams, Cashier and Treasurer of said bank, and certified by H. E. Tresnon, Commissioner of the Revenue, as being a true copy of the original on file in his office. (See record, page 20, where it was made a part of the answer of the City of Richmond to the petition of the plaintiff in error filed in the Hustings Court of the City of Richmond.) See also evidence of H. E. Tresnon, Commissioner of the Revenue, pages 42-43, where it is shown that this paper (Exhibit R) was the basis of the assessment complained of in the Hustings Court. The record also shows that this report was the basis upon which the bank, as hereinbefore stated, made up and returned to the Commissioner of the Revenue Exhibit G, interleaved in the record between pages 44-45, which the Commissioner of the Revenue testified was furnished the bank for that purpose. Not only is this true, but the learned counsel for the Bank on the request of counsel for the City of Richmond produced Exhibit H, also interleaved between pages 44-45. This last paper (Exhibit H) being the assessment made by the Commissioner of the Revenue derived from the information contained in Exhibit R. It shows in the last column, headed "City Tax", the exact taxes assessed against each stockholder on his shares of stock and the aggregate of the tax so assessed, namely, \$18,489.20, which sum under the statute the Bank was required to pay and did pay, of which assessment and payment it subsequently complained, and is now complained of in

this Court by the prosecution of this writ of error. Each of these exhibits show upon its face that the assessment was made and extended not upon the whole of the "capital, surplus and undivided profits" of the Bank, but upon such "capital, surplus and undivided profits" *less, as the statute requires, "the assessed value of its real estate otherwise taxed in this State"*. (The italics are ours.)

By reference to the New York statutes assessing shares of bank stock, hereinbefore quoted, it will be seen that the Virginia statute, in the matter of deductions to be made from "capital, surplus and undivided profits," is on "all fours" with the New York statutes.

The force and effect of the exhibits, referred to above, is sought to be impaired, if not destroyed, by referring to and characterizing them in the parole evidence in inquiries made of the Commissioner of the Revenue and in said brief of the learned counsel, page 23, as "loose papers", for the alleged reason that the name of each stockholder was not placed upon the personal property book, but was only placed on the State assessment in a separate column, as shown by Exhibit H. Hence, it is argued that to make a valid assessment, there would be some more definite statement preserved in the office of the Commissioner of the Revenue than that shown by said exhibits. To this, it is answered, that if there be any such requirement by statute, and there is none, it would be in its nature *directory* rather than *mandatory*, and while it seems to us authorities to sustain this statement need not be cited, as they are too familiar to require citation, yet we beg to refer to 1 Cooley on Taxation,

479-480, and again at note on page 488, in the same volume, where it is said:

“Statutory provisions as to the time of completing, verifying, returning, delivering or *filing assessment roll* held to be directory merely”. (Citing cases from Iowa, Ky., N. Y., Penna., Ala., Mich. and *Atlantic Trust Co. vs. Darlington*, 63 Fed. 76). (The italics are ours.)

For other authorities on this point, see Addition to the Record, pages 22-28, used as the City's brief before the Supreme Court of Appeals of Virginia. Among these, is Cooley on Constitutional Limitations, 4th Ed., page 89, where it is said:

“Nor must we fail to distinguish between provisions that are mandatory and such as are directory merely; by which latter is meant those provisions that are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them”.

Even more pertinent of the authorities so cited, is *Bank vs. Waters*, 7 Fed. 152, where it was held:

“That the omission of the city clerk to extend upon the assessment roll the amount to be paid by each shareholder until after such roll had been delivered to the State Treasurer does not render the taxation of shares of stock void”.

To show that the language of the learned President was not intended to be interpreted as the counsel contends, we cite the opinion of the court reversing the order of the Hustings Court, where the learned President (Whittle) uses this language:

“This case originated in the Hustings court with a petition by the *Merchants National Bank of Richmond* against the *City of Richmond*, to correct an *alleged* erroneous assessment for the year 1915, directly against the bank upon its capital stock, surplus and undivided profits, less the assessed value of its real estate and other deductions allowed by the law, instead of being levied and assessed against the shareholders of the stock of the bank upon the value of their shares ascertained as the law prescribes”. (The italics are ours.)

Again in the opinion, the court speaking through the learned President of the Court, says:

“The remaining controverted question for our determination is, what was the maximum rate which the *City of Richmond* could lawfully levy *on the shares of bank stock* for the year 1915?” (The italics are ours.)

This issue thus stated shows that it was recognized by that court that the assessment levied was made on shares of bank stock and not upon the “capital, surplus and undivided profits” of the bank as contended.

The contention made in the brief of the plaintiff in error, on the motion to dismiss or affirm, found on page

23, that the Supreme Court of Appeals of Virginia in its order, rejecting the petition of the plaintiff in error, praying an appeal from the final order of the Hustings Court, dismissing the petition of the plaintiff in error (Record, pp. 53-54), cannot be sustained, for the same was made in exact conformity with Section 3466 of the Code of Virginia, 1887, where it is provided, that:

“The petition shall be rejected when it is from an interlocutory decree or order, in a case in which the court or judge to whom it is presented deems it most proper should be proceeded in further in the court below before an appeal is allowed therein. In a case wherein the court shall deem the judgment, decree or order complained of, plainly right, and reject it on that ground, and the order of rejection so states, no other petition therein shall afterwards be entertained”.

This section was construed in the *McCue case*, 103 Va. 870, 1008, S. C. 49 S. E. 623, where it was said:

“It is as much the duty of the court or the judge to deny the petition when of opinion that the decision complained of is plainly right as it is to grant it when any doubt exists as to the propriety of the decision”. (3 Va. Code Annotated Supplement 1910.)

Yet the learned counsel deduces from this formal recital in said order of rejection, that the Supreme Court of Appeals of Virginia had undertaken to overrule or at least to modify what was held in its elaborate and able

opinion deciding the case on its merits though that decision and its order made on March 13, 1919 (Rd., pp. 52-53) carrying out that decision, had *directed* that the Hustings Court, to which the case was remanded, should take further proceedings, using this language:

“In conformity with the views expressed in the said written opinion of this court”, namely, the opinion found on pages 49-52 of the record.

Discounting, if not absolutely destroying the value of this contention, the learned counsel themselves say in their brief, *by way of apology* for making the contention now being discussed, that:

“The point relating to method of assessment of the tax against the bank instead of against the shareholders was only incidental, and it came into prominence only when the City advanced the technical claim that the petition should be dismissed because the bank was not assessed with the tax and was not aggrieved thereby. When the City thus attempted to shirk its obligation to return money wrongfully collected by it upon a ground which in nowise affected the merits of the case, it then became necessary for the bank to emphasize the fact that not only was the tax assessed at a grossly discriminating rate, but that it was also assessed against the bank itself in a manner prohibited by the law, both State and Federal”.

But apart from the last foregoing discussion, the question bore exclusively upon the *construction* to be

placed upon an ordinance of the Council of the City of Richmond. That ordinance as construed by the Supreme Court of Appeals of Virginia in the light of other ordinances and statutes *in pari materia*, specially referred to in the Addition to the Record, which was the brief for the then plaintiff in error in the Supreme Court of Appeals of Virginia, held that:

“The ordinance approved April 9, 1915, is founded upon the city charter and the segregation act passed by the general assembly at its extra session of 1915, and approved March 15, 1915 (an emergency was declared to exist with respect to it, so that the act was in force from its passage). Acts 1915, Ch. 85, p. 119. The gravamen of the bank's complaint is that its capital is taxed at the rate of \$1.40 on the \$100, instead of thirty cents, the rate imposed on other moneyed capital in the hands of individuals. Its contentions are based on an alleged conflict between the ordinance and section 1040-a of the Code; section 168 of the State Constitution; the fact that at the date of the assessment the rate of taxation on all intangible property taxed that was also taxed by the State was at the rate of thirty cents on the \$100; and that a higher rate than thirty cents contravened section 5319, Rev. Stat. of the U. S. All of these objections except the last were practically disposed of by the construction placed upon the segregation act by the decision of this court in the case of *City of Richmond vs. Drewry-Hughes Co.*, 122 Va. 15 Va. App. 161, 94 S. E. 989. * * * * *

“Since, therefore, we have no purpose to recede from the conclusions reached in the mer-

chants' tax case, further elaboration of the questions settled by that decision is unnecessary. This statement is predicated upon the view that the exceptions in the act of 1915, in respect to the capital of merchants and the shares of stock of banks in the particular here involved are so concatenated as necessarily to demand the same construction".

We hardly think that the excuse or apology for not earlier presenting to the court the question now discussed will impress this Honorable Court.

We, therefore, submit for the reasons stated above that this belated contention cannot be sustained.

Respectfully submitted,

HENRY R. POLLARD,

GEO. WAYNE ANDERSON,

Counsel for the City of Richmond.

LIST OF AUTHORITIES AND CASES CITED.

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*NOTE: On page 21 this case is cited as National Bank, of Wilmington v. Chapman, 143 U. S. 205-214. The correct citation is 173 U. S. 205-214.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 240.

THE MERCHANTS NATIONAL BANK OF RICHMOND,
VIRGINIA, Plaintiff in Error,

v.

THE CITY OF RICHMOND, Defendant in Error.

ERROR AND CERTIORARI TO THE SUPREME COURT OF
APPEALS OF VIRGINIA.

REPLY BRIEF OF PLAINTIFF IN ERROR ON MERITS.

STATEMENT OF CASE.

This is a writ of error and a petition for a writ of certiorari to the State Court of Appeals of Virginia, to review a judgment of that court denying to the plaintiff in error a Federal right.

The Federal question presented is whether or not the constitution and laws of the United States, and particularly section 5219 of the revised statutes, were violated by an assess-

2 *Merchants National Bank v. City of Richmond.*

ment of taxes by the city of Richmond, Virginia, against the Merchants National Bank of Richmond, pursuant to an ordinance of that city which provided:

“An Ordinance.

(Approved April 9, 1915.)


To Amend and Re-ordain Sections 2 and 3 of Chapter 15, Richmond City Code, 1910, concerning the Levying of Taxes.

Be it ordained by the council of the city of Richmond:

1. That sections 2 and 3 of Chapter 15, Richmond City Code, 1910, be amended and re-ordained so as to read as follows:

2. On all real estate, tangible personal property and rolling stock of railways, other than steam roads, not exempted from taxation, one and sixty-five one-hundredths per centum of value.

3. On all intangible personal property, including bonds and stocks, three-tenths per centum of value; on bank capital, surplus and undivided profits, less assessed value of real estate included in said capital and surplus and undivided profits, one and fifteen hundredths per centum of value, provided that for the year 1915, the tax on bank capital, surplus and undivided profits shall be one and four-tenths per centum of value; on capital employed in business, not otherwise taxed as intangible personal property, one and four-tenths per centum of value. The taxes upon such shares of stock in any bank,

 located and doing business in the city, shall be assessed and collected in accordance with the provisions of the Acts of General Assembly of Virginia of 1915.

This ordinance shall be in force from its passage.”
(Record, pp. 28, 29.)

Acting under authority of this ordinance, Hon. Henry E. Tresnon, commissioner of the revenue of the said city, made this entry in his personal property book, which, under the laws of Virginia, is the official assessment roll for local taxes:

“Merchants National Bank, 1915, value, \$1,320,622.11; tax on that value, \$18,489.20.” (Record, p. 30.)

This assessment was delivered to the city collector of taxes, who made out a tax bill against the bank in conformity therewith. This bill was paid by the bank when it was presented. Within the time prescribed by law the bank applied to the Hustings Court of the city of Richmond for a correction of the assessment and a refund of the taxes improperly assessed against it.

The plaintiff in error has throughout the case insisted and now maintains that the tax assessed under this ordinance violates section 5219 of the revised statutes in two respects:

1. It is a tax assessed against the bank in solido upon its capital, surplus and undivided profits.

2. It is at the rate of \$1.40 on the \$100.00, while the tax imposed by this ordinance on all other moneyed capital in the hands of individuals, is at the rate of 30c on the \$100.00.

CORRECTION OF CERTAIN ERRORS CONTAINED IN
BRIEF OF DEFENDANT IN ERROR.

Before entering upon the argument of the case on its merits, it is thought proper to point out several errors appearing in the statement of facts in brief of defendant in error which no doubt were due to inadvertence on the part of the learned counsel, who prepared it.

On page 3 of said brief it is alleged:

“The gravamen of this paper (that is, the petition of the plaintiff in error asking for the correction of an alleged erroneous assessment of city taxes for the year 1915), was that the tax of \$18,489.20 had been levied upon the **stockholders** by the city of Richmond, etc.”

Again, on page 4 of said brief, quoting in part from the record at page 11, it is sought to create the impression that the only discrimination against the capital of petitioner was that expressly prohibited in section 1040-A of the statutes of Virginia. The following is part of the petition of the plaintiff in error, from which the above quotations are made:

“And your petitioner avers that the levy and assessment of the tax by the said city of Richmond hereinbefore mentioned and complained of was illegal and erroneous in this that said tax, instead of being levied and assessed by said city of Richmond against the shareholders of petitioner upon the value of the shares of stock held by them respectively, was levied and assessed by it in **solido** against petitioner itself upon the aggregate of its capital, surplus and undivided profits less the deductions therefrom hereinbefore mentioned and

as so levied and assessed, was a tax upon the capital of petitioner contrary to section 5219 of the revised statutes of the United States and likewise contrary to the following statutes of Virginia then in force, to-wit: Section 1040-A of the Code of Virginia (Pollard's Edition, 1904); Section 17 of the Revenue Bill of April 16, 1903, as said section was amended and re-enacted by an act approved March 12, 1909, and as further amended and re-enacted by an act approved January 30, 1912, etc., etc." (Record, p. 10.)

"And your petitioner avers that the intangible personal property aforesaid consisted of bonds, stocks and evidences of debt and represented 'other monied capital in the hands of individuals residing in the State and city within the sense and meaning of section 5219 of the revised statutes of the United States, and competed directly with the capital of petitioner and with other banking associations aforesaid, and that said tax of \$1.40 on \$100.00, amounting to \$18,489.00, was assessed and collected by the city of Richmond as aforesaid, was a gross, intentional and willful discrimination on the part of the city of Richmond against petitioner and against its capital and the shares of stock representing the same on the one hand, in favor of other monied capital aforesaid, and the owners thereof on the other hand in plain and obvious violation of section 5219 of the United States Revised Statutes. (Record, p. 13.)

From the above it will be seen that there is no ground for the statements in the brief of defendant in error to the effect that the gravamen of the petition was, that the tax of \$18,489.99 had been levied upon the stockholders by the city

of Richmond, and that the only discrimination against the capital of petitioner was that expressly prohibited by section 1040-A of the Statutes of Virginia.

On page 5 of said brief, it is alleged :

"On August 1, 1917, the hustings court filed a written opinion overruling the motion of the city of Richmond to dismiss said petition on the ground hereinbefore stated and held that it had jurisdiction to correct said assessment by limiting the rate to thirty cents instead of \$1.40, thus overruling the contention of the plaintiff in error that the assessment was an assessment in solido against the surplus and undivided profits of the bank."

As a matter of fact, the learned judge of the Hustings Court of the city of Richmond held directly the contrary, which appears from his opinion. (Rec., pp. 22 and 23.)

"The commissioner says that when he made the assessment the ordinance of April 9, 1915, was in force and before him for his guidance, and the property book in his office shows that the assessment was as follows:

'Merchants National Bank, 1915 value, \$1,320,662.11; tax on that value, \$18,489.20.'

I am of opinion, therefore, that this assessment by the city for the year 1915 was made under the provisions of the ordinance of April 9, 1915, that it was upon the capital, surplus and undivided profits of the Merchants National Bank and that said bank has the right to file its petition and to be heard in this court on its motion to correct said assessment."

ARGUMENT OF CASE.

FIRST POINT.

THE ASSESSMENT WAS VOID BECAUSE IT WAS MADE
DIRECTLY AGAINST THE BANK ITSELF
ON ITS CAPITAL, SURPLUS AND UN-
DIVIDED PROFITS **IN SOLIDO**.

On page 9 of the brief for the defendant in error, it is said:

"FIRST—The record does not show, as it must affirmatively show, under the decisions of this Honorable Court, that there is any ground to contend successfully that the taxing laws in force in the city of Richmond at the time of the assessment were violative of section 5219 of United States Revised Statutes.

For the more convenient examination of the statutes of the State of Virginia providing for the taxation of shares of bank stock with those of the State of New York held to be constitutional and valid on practically the same grounds as those now insisted upon, in the case of **Amoskeag Savings Bank v. Purdy**, *supra*, we beg to insert in parallel columns the statutes of these two States."

Reference to the record will show that the levy and assessment complained of in the case at bar were not the levy and assessment made by the commissioner of revenue for State taxes, but a levy and assessment of city taxes made under ordinance of April 9, 1915, which ordinance is as follows: (Rec., p. 28).

"An Ordinance.

To amend and re-ordain sections 2 and 3 of Chapter 15, Richmond City Code, 1910, concerning the levying of taxes.

Be it ordained by the council of the city of Richmond:

1. • • • •

2. • • • •

3. On all intangible personal property, including bonds and stocks, three-tenths per centum of value; **on bank capital, surplus and undivided profits**, less assessed value of real estate included in said capital, surplus and undivided profits, 1.15 per centum of value, provided that for the year 1915, **the tax on bank capital, surplus and undivided profits shall be 1.4 per centum of value**; on capital employed in business, not otherwise taxed as intangible personal property, 1.4 per centum of value. The tax upon such shares of stock in any bank, located and doing business in the city of Richmond, shall be assessed and collected in accordance with the provisions of the Acts of Assembly of the year 1915."

The testimony of H. E. Tresnon, commissioner of revenue, shows that in making the levy and assessment of State taxes for the year 1915, he followed a statute in general terms similar to that set out on pages 11 to 18 of brief of defendant in error, the statute set out in said brief not being in force at the time the levy and assessment were made.

The same witness, however, shows that he did not follow this statute in levying the city taxes upon the aggregate of the capital, surplus and undivided profits of the bank against the bank itself at the rate of \$1.40 on the \$100.00.

"Q. Have you produced the personal property book for the year 1915?

A. Yes.

Q. Will you please turn to that book and read entry upon it relating to the assessment of the Merchants National Bank for 1915?

A. Merchants National Bank, 1915, value, \$1,320,-662.11; tax on that value, \$18,489.20. On the city personal tax for 1915.

Q. Is that the entry of the assessment in question?

A. Yes. (Rec., p. 30.)

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"Q. This ordinance, as I understand it, was furnished by the city of Richmond to you as an ordinance of the city of Richmond then in force to be used by you in your official duties?

A. Yes. This ordinance was furnished to me as an ordinance of the city of Richmond, approved April 9, 1915. Each ordinance has to be furnished to the head of each department after it has been approved and printed.

Q. And this ordinance was in force when you made the assessment of the bank?

A. This ordinance was for my guidance.

Q. And was in force when you made the assessment?

A. And was approved and in force when the assessment was made.

Q. And was the ordinance you followed when you made the assessment?

A. The assessment of banks, yes. I made the assessment at the rate of \$1.40 as the ordinance prescribed. (Rec., pp. 31-32.)

The witness having testified that in the matter of the levy and assessment of State taxes he kept one copy of the assessment roll furnished by the Auditor of Public Accounts for the assessment of State taxes and forwarded the other to the said Auditor, which assessment roll gave the names of officers, the names of shareholders and reference to the shareholders, the number of shares of stock held and controlled by each shareholder; the par value of each share of stock, the actual value of each share of stock estimated on the capital, surplus and undivided profits after deducting the assessed value of real estate of the bank; the aggregate value of the shares of stock of each shareholder estimated on the capital, surplus and undivided profits after deducting assessed value of real estate of said bank, etc., was asked the following questions:

Q. Read what you read as to the Merchants National Bank.

A. For city taxes or for State purposes, or for both?

Q. Just for both.

A. Merchants National Bank number of shares 2000; par value of each share \$100.00; actual value after deducting real estate \$665,992.

Q. Was that in your personal book which you brought in here this morning?

A. No. Just the total, \$1,320,662.11.

Q. What was on your personal property book?

A. Value \$1,320,662.11; tax \$18,489.20.

Q. That is all that is on the personal property book?

A. Yes.

Q. And you said the personal property book contained a summary. Does it contain any reference to stockholders?

Q. The only thing it contains is the name of the bank which is in the place where appears the name of the person assessed with personal property, then the amount with which it is assessed, then the tax on that amount. That is all that appears on the official record known as the personal property book.

A. Yes, sir.

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Q. This refers to both State and city?

A. That is for the city. For the State we have the original report on file in the office.

Q. Don't you enter that on your personal property book?

A. No, sir.

Q. And that is true about the city?

A. Yes, sir. (Rec. pp. 45-46.)

It being thus shown that the Commissioner of Revenue did not levy and assess the city tax for the year 1915 in accordance with the statute of Virginia, but levied and assessed said taxes against the bank itself in **solide upon the capital, surplus and undivided profits of said bank** in accordance with the above quoted ordinance, it necessarily follows that said levy and assessment are void.

Moreover, although the statutes of Virginia in force at the time this assessment was made, (sections 17, 18, 19, 20, 21 22, of the State tax bill as amended by the Act approved Jan'y 30, 1912, printed in full in the brief of plaintiff in error in support of petition for certiorari, pages 14 to 17, inclusive,) which sections provide that State taxes shall be assessed upon the shares of stock held by each stockholder, and the total amount of taxes assessed against the stockholders, collected

from the bank, and although section 1040-a of the Code of Virginia, printed in full on page 18 of plaintiff in error's brief, on *certiorari* which was the only authority in force at the time for the levy by the city of Richmond of any tax upon the stock of the plaintiff in error, provides that the city may follow the mode of assessment and manner of collection prescribed by statute for collection of State taxes upon such shares, yet at the time this assessment was made there was no ordinance in force in the city of Richmond prescribing any mode of assessment of taxes upon bank shares so that the tax would be collected from the bank, the ordinance providing only for the assessment of a tax against the bank upon its capital, surplus and undivided profits.

For this reason, the only valid assessment which could have been made by the city of Richmond against petitioner's shareholders upon their shares of stock was, by assessing such shares of stock against the owners thereof in the same manner in which their other property was assessed. The fact that the assessment was made against the bank on the personal property book upon the aggregate of the capital, surplus and undivided profits, and not against the shareholders, and the absence of any ordinance authorizing the collection from the bank of taxes assessed against the shareholders, shows conclusively that this tax was assessed in strict conformity with the ordinance of April 9, 1915, against the bank upon its capital, surplus and undivided profits, and that, therefore, it was repugnant to section 5219 of the U. S. Revised Statutes, which provides that:

"Nothing herein shall prevent all shares in the association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located, etc."

Recognizing the immutable rule that there can be no liability for a tax unless it is assessed in conformity with a valid statute, or ordinance in the case of a local tax, prescribing the machinery for the assessment of the tax, the Supreme Court of Appeals of Virginia said in a recent case, **Commonwealth v. Lorillard**, decided Jan'y 20, 1921:

"The assessment being so important, the statutory provisions respecting its preparation and contents ought to be observed with particularity. They are prescribed in order to secure equality and uniformity in the contributions which are demanded for the public service, and if officers, instead of observing them, may substitute a discretion of their own, the most important security which has been devised for the protection of the citizen in tax cases might be rendered valueless." *Cooley on Taxation* (3rd Ed.) 598-9.

"The Legislature has the sole power of determining what machinery shall be exercised in carrying out the provision of a law authorizing the imposition of taxes." **Board of Education v. Kingfisher**, 5 Pkl. 82, 89.

"In **Supervisors v. Tallant**, 96 Va. 723, we held that property can only be taxed in the mode prescribed by law, and that the Constitution imposes upon the Legislature the duty of passing such laws as are necessary to carry into effect its provisions relating to taxation, and unless it does so the tax cannot be collected; and in **Marye v. Diggs**, 98 Va. 752, that taxes can only be assessed, levied and collected in the mode pointed out by express statutory exactment. Statutes imposing taxes are construed most strongly in favor of the taxpayer, and will

not be extended by implication to the prejudice of the taxpayer beyond the clear import of the language used.

Taxes are imposed by the State in the exercise of its sovereign power. This power is exerted through the Legislature, and an executive officer who seeks to enforce a tax must always be able to put his finger upon the statute which confers such authority. Taxes can only be assessed, levied and collected in the manner prescribed by express statutory authority. Tax assessors have no power to make an assessment except in the manner prescribed by law, and if the statute prescribes a method of assessment which is invalid, the assessor has no power or authority to adopt a method of his own which would have been legal if it had been prescribed by the Legislature."

SECOND POINT.

THE ASSESSMENT AT THE RATE OF \$1.40 ON THE HUNDRED DOLLARS VALUATION WAS AT A HIGHER RATE THAN THAT IMPOSED ON OTHER MONEYED CAPITAL IN THE HANDS OF INDIVIDUALS.

The Supreme Court of Appeals of Virginia, in its opinion (Rec. p. 51) thus disposes of the repugnancy of the city ordinance to section 5219 U. S. Revised Statutes:

"Adverting briefly to the contention that the construction we are disposed to place upon the segregation act and the city ordinance is in conflict with section 5219 of the Revised Statutes of the United States in that the tax of \$1.40 on the \$100.00 of shares of bank stock is a higher rate than is assessed upon other moneyed capital in the hands of individual citizens of

the State; obviously, the general purpose of the Federal statute is to prevent discrimination by the State in favor of State banking associations against national banking associations; and no such discrimination is suggested or shown by the record to exist." (Then follows a quotation from 9 U. S. Comp. Stat. 1916, title National Banks, at page 11,993, note 29, and a number of cases of this court, including a recent leading case of **Amoskeag Savings Bank v. Purdie**, *supra*.) The opinion concludes 'These decisions of the Supreme Court of the United States (and authorities might be multiplied on the subject) show that the fundamental grievance of the defendant in error that the rate of tax imposed under the segregation act and the ordinance of the city of Richmond upon the shareholders of bank stock constitute 'a gross and illegal discrimination against that species of property as compared with other moneyed capital' is groundless.'

It is respectfully submitted that the position thus taken by the Supreme Court of Appeals of Virginia that other moneyed capital in the hands of individuals, as referred to in section 5219 U. S. Revised Statutes, is confined to stock in State banking associations is not supported by a single authority of this Honorable Court, but is denied by it throughout a long range of decisions. Directly in point is the following citation and authorities:

"If the State and national banks were treated equally, the latter were not assessed at a greater rate than the former, national bank shareholders were not in such event illegally assessed unless there was a clear discrimination in favor of moneyed capital other than that employed in either State or national banks.

First National Bank v. Chapman, 173 U. S. 205-216
Merchants, etc. Bank v. Penn., 167 U. S. 461-456 **Lion-berger v. Rouse**, 9 Wallace, 468, constructing act of 1864; **Amoskeag Savings Bank v. Purdy**, 231 U. S. **Supra** and cases therein cited.

The evidence as to the amount of other moneyed capital in the hands of individuals is as follows:

On page 33 of the Record, H. E. Tresnon, Commissioner of Revenue testified:

Q. Mr. Tresnon, from the personal property books of 1915 that you have just exhibited, can you state the aggregate amount of capital of all the State banks and trust companies in the city of Richmond, and also of all the national banks?

A. I can give the values upon which the tax was assessed on national banks. That was \$8,320,521.00 in value for 1915. The tax was \$116,487.20 at the rate of \$1.40. Now other than national banks the value was \$6,030, 294.00. The tax on that value is \$84,425.40 at the rate of \$1.40.

Q. When you say 'other than national banks' do you mean State banks?

A. That includes State banks, trust companies, and bank and trust companies.

Q. Can you state from the book above referred to the aggregate net amount of capital returned for taxation under the head of bonds, notes and other evidences of debt for the year 1915?

On page 48 of the Record, Mr. Tresnon, Commissioner of Revenue, being recalled by permission of the court, testified as follows:

"That the notes, bonds and other evidences of indebtedness returned and assessed for taxation for the year 1915 amounted to \$6,250,252.00 that municipal bonds returned and assessed for taxation for the year 1915 amounted to \$981,040.00.

That real estate agents who negotiate loans on real estate are required by the State law to take out licenses as private bankers. There were forty-five such real estate agents who took out licenses as private bankers in the year 1915."

On page 46 of the record, the same witness testified as follows:

Q. A good deal has been said about the tax rate that you imposed on intangible personal property for the year 1915. Was there any intangible property or any moneyed capital in the hands of individuals residing in the city of Richmond, other than the capital, surplus and undivided profits of banks and banking associations, on which you assessed a tax of \$1.40 on the \$100.00?

A. In 1915?

Q. Yes. Was there any moneyed capital in the hands of individuals that you assessed?

A. There was capital employed in the city of Richmond that we taxed at \$1.40. That was merchants' capital.

Q. I mean capital that was used as money. Of course, capital used in the mercantile business is not capital that is used as money. Was there any other moneyed capital that you imposed a \$1.40 tax on?

A. No, sir.

Q. Was there any other moneyed capital in the hands of individuals residing in the city of Richmond that you assessed with a tax of more than thirty cents on the \$100.00 for 1915?

A. It is hard to answer a question of that kind because there was a \$1.40 rate on certain capital which the State did not tax at all.

Q. What kind of capital was that?

A. Other capital was taxed at \$1.40.

Q. Was there anybody except merchants and banks that you taxed at \$1.40?

A. No other capital.

Thomas B. McAdams, vice-president of the Merchants National Bank of Richmond, the plaintiff in error, testified as follows:

Q. Will you kindly state whether or not moneyed capital in the hands of individuals invested in bonds, notes and other evidences of debt comes in competition with national banks?

A. Yes.

Q. Will you kindly explain how this is so?

A. Our assets are invested in bonds, notes and other evidences of debt. The loan of money or the extension of credit is simply regulated, or largely regulated, by supply and demand. The more money there is to be loaned by individuals or corporations, the natural tendency is for a lower rate than a bank can get on a similar investment. In other words, the greater the competition, the lower the rate, the greater the demand, the higher the rate.

Q. Do the national banks lend money on notes secured by real estate?

A. You are speaking with reference to 1915?

A. Yes.

Q. Yes, they would take a note as collateral for another loan. Very often the loan would be paid off because of the fact that the collateral was taken up by the borrower and then the banks have to seek other channels for investment of their funds.

In support of the contention that the lower rate of tax on notes, bonds and other evidences of debt than shares of bank stock has been recognized by this Honorable Court as an unjust discrimination and as repugnant to Section 5219 of United States Revised Statutes, we quote the following cases:

In the case of *Boyer v. Boyer, et als.*, county commissioners, 113 U. S. 689, it was held:

"The laws of Pennsylvania exempted from local taxation for county purposes, railroad securities, shares of stock held by stockholders in corporations which were liable to pay certain taxes to the State; mortgages; judgments; recognizances; money out on contract for sale of real estate; loans by corporations, which were taxable for State purposes, when the State tax should be paid. The pleadings in the case admitted, in detail, large amounts of exempted property under this head in the State; held: That under these circumstances this constituted a discrimination in favor of other moneyed capital against capital invested in shares in national banks, which was inconsistent with provisions of Sec. 5219, Rev. Stat., that taxation by State authority of national banks shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State."

In *Mercantile Bank v. New York*, 121 U. S., page 138, at page 157, the court, by its express declaration, included securities such as were given the benefit of the thirty-cent rate in the case at bar, as other moneyed capital in the hands of individuals.

"The terms of the act of congress, therefore, includes shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and re-invested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank v. Britton*, 105 U. S. 322: "The Act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily

moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way."

The above statement of the law is quoted with approval at length in the case of **Amoskeag Savings Bank v. Purdie**, 231 U. S. at pages 390-391. The court concluding its observations on this point by saying:

"The rule of construction thus laid down has been since consistently adhered to by this court. **Palmer v. McMahon**, 133 U. S. 660-667; **Aberdeen Bank v. Chehalis County**, 166 U. S. 440-454; **National Bank of Wilmington v. Chapman**, 143 U. S. 205-214; **Commercial Bank v. Chambers**, 182 U. S. 556-560; **Jenkins v. Neff**, 186 U. S. 230.

It is respectfully submitted that if "rights, demands, credits and money at interest" constitute moneyed capital, as declared above, then notes, bonds and other evidences of indebtedness, being of identical character, are moneyed capital as contemplated by Section 5219, U. S. Revised Statutes.

The testimony shows that under the latter head there was returned for taxation for the year 1915 in the city of Richmond above the large sum of \$8,231,292.00, on which the low rate of thirty cents on the \$100.00 was taxed, and that bank capital was the only form of moneyed capital that was taxed at the high rate of \$1.40 on the \$100.00; in fact, bank capital was the sole species of moneyed capital which was taxed at a rate exceeding thirty cents on the \$100.00.

It is further submitted that under authority of **Amoskeag Savings Bank v. Purdie**, *supra*, and the cases therein cited that notes, bonds and other evidences of indebtedness are, as a matter of law, "other moneyed capital in the hands of in-

dividuals'' within the meaning of Section 5219, Revised Statutes, and that it is not necessary to show which items constituting the many millions thus employed compete with the capital of the plaintiff in error and lessen the value of its shares, as all of such credits are recognized as investments of a character which necessarily come into competition with the bank and by their favored position with regard to taxation, tend to discourage investment in national bank shares.

For these reasons, and for the reasons set out in the brief of the plaintiff in error in support of its petition for certiorari and in its brief on defendant in error's motion to dismiss, which briefs are now filed in this case, and for the reasons set out in plaintiff in error's petition for writ of error to the Supreme Court of Appeals of Virginia contained in record, pages 1 to 8 inclusive, it is respectfully submitted that the judgments of the Supreme Court of Appeals of Virginia, of March 13, 1919 (Rec., p. 52), and of Nov. 25, 1919 (Rec., p. 54), and the order of the Hustings Court of the city of Richmond, of April 19, 1919 (Rec., p. 53), should be reversed, and the order of the Hustings Court of the city of Richmond, of Aug. 3, 1917 (Rec., p. 21), should be affirmed.

Respectfully submitted,

MERCHANTS NATIONAL BANK,
of Richmond, Va.
By Counsel

E. WARREN WALL and
LEGH R. PAGE, Counsel.

2. Where the state court omits to find the facts relevant to a question of federal law, it is the duty of this court to examine the evidence on the subject. P. 638.
 3. In the provision of Rev. Stats., § 5219, respecting state taxation of shares of national banks, that it "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," the words "moneyed capital in the hands of individual citizens" include bonds, notes and other evidences of indebtedness in the hands of individuals, which are shown to come materially into competition with the national banks in the loan market. P. 638.
- 124 Virginia, 522, reversed; application for writ of certiorari denied.

THE case is stated in the opinion.

Mr. Legh R. Page, with whom *Mr. E. Warren Wall* was on the briefs, for plaintiff in error.

Mr. H. R. Pollard and *Mr. George Wayne Anderson*, for defendant in error, submitted.

MR. JUSTICE PITNEY delivered the opinion of the court.

The court of last resort of Virginia sustained a tax assessed by the City of Richmond in the year 1915, in form against plaintiff in error, a national banking association, in substance and effect against its shareholders, overruling a contention based upon the Constitution and laws of the United States. To review its judgment a writ of error has been sued out and allowed, and application has been made also for the allowance of a writ of certiorari. The proceeding originated in the Hustings Court of the City of Richmond with a petition filed by the Bank against the City to correct the assessment as erroneous. The first hearing resulted in an order granting the relief prayed for, upon grounds not now material; but, upon review by the Supreme Court of Appeals, this was reversed (124 Virginia, 522), and the case remanded

for further proceedings in conformity with the views of that court; in consequence of which, correction of the alleged erroneous assessment was refused by the trial court, and the proceeding dismissed. An application for a writ of error to review this judgment was denied by the Supreme Court of Appeals, with the effect of affirming the judgment of the Hustings Court.

The tax was imposed pursuant to an ordinance approved April 9, 1915, passed under the powers conferred upon the City by its charter and an act of the General Assembly approved March 15, 1915 (Virginia Acts 1915, c. 85, p. 119). The opinion of the court of last resort shows that plaintiff in error drew in question the validity of the ordinance and statute, as construed and applied, upon the ground of their alleged repugnance to § 5219, Rev. Stats., and that the court sustained their validity notwithstanding. Under § 237, Jud. Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726, a writ of error is the appropriate process for reviewing the final judgment in this court, and the petition for allowance of a writ of certiorari will be denied.

It will not be necessary to recite the provisions of the statute and ordinance, beyond saying that, taken in connection with another act of the General Assembly, approved March 17, 1915 (Virginia Acts 1915, c. 117, p. 160), they authorized the imposition for the year 1915 upon bank stocks, state and national, of a tax for state purposes at the rate of 35 cents and a tax for city purposes at the rate of \$1.40—a total of \$1.75—upon the \$100 of valuation, while upon intangible personal property in general, including bonds, notes, and other evidences of indebtedness, the state rate was 65 cents and the city rate 30 cents, an aggregate of 95 cents, upon each \$100 of valuation.

The Bank's petition alleged, and the evidence showed without dispute, that in the City of Richmond, in 1915,

city and state taxes at the rates first mentioned were imposed upon national bank stocks (including that of plaintiff in error) to the aggregate value of more than \$8,000,000 and stocks of state banks and trust companies to the value of \$6,000,000 and upwards, while taxes at the lower aggregate rate of 95 cents per \$100—city tax 30 cents, state tax 65 cents—were imposed for the same year upon bonds, notes, and other evidences of indebtedness aggregating \$6,250,000. It is to be inferred that a substantial part of this aggregate was in the hands of individual taxpayers; the precise amount does not appear. It also was shown by evidence without dispute that moneyed capital in the hands of individuals invested in bonds, notes, and other evidences of indebtedness comes into competition with the national banks in the loan market.

Neither of the state courts passed upon this evidence or made findings of fact thereon; doubtless because, under their respective views of the applicable law, the facts referred to were immaterial. But this omission does not relieve us of the duty of examining the evidence for the purpose of determining what facts reasonably might be, and presumably would be, found therefrom by the state court, if plaintiff in error's contention upon the question of federal law should be sustained, and the facts thereby shown to be material. *Carlson v. Curtiss*, 234 U. S. 103, 106.

The Supreme Court of Appeals entertained the view that the purpose of § 5219, Rev. Stats., was confined to the prevention of discrimination by the States in favor of state banking associations as against national banking associations, and that since none such is shown here there was no repugnance to the federal statute. This, however, is too narrow a view of § 5219. It traces its origin to § 41 of the Act of June 3, 1864, c. 106, 13 Stat. 99, 111-112, in which, besides the restriction that state taxation of the shares of national banking associations should not be at a

greater rate than that assessed upon other moneyed capital in the hands of individual citizens of such State, there was an express proviso that the tax should not exceed the rate imposed upon the shares of state banks. But this was modified by Act of February 10, 1868, c. 7, 15 Stat. 34, in a manner which, as was pointed out in *Boyer v. Boyer*, 113 U. S. 689, 691-692, precluded the possibility of an interpretation permitting the States, while imposing the same taxation upon national bank shares as upon shares in state banks, to discriminate against national bank shares in favor of moneyed capital not invested in state bank stock. "At any rate," said the court, "the acts of Congress do not now permit any such discrimination." In the amended form the provision was carried into the Revised Statutes as § 5219, which prescribes that state taxation of shares in the national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

By repeated decisions of this court, dealing with the restriction here imposed, it has become established that, while the words "moneyed capital in the hands of individual citizens" do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking. In *Evansville Bank v. Britton*, 105 U. S. 322, 324, the court said: "The act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations

are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. *But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way. . . .* We are of opinion that the taxation of bank shares by the Indiana statute, without permitting the shareholder to deduct from their assessed value the amount of his *bona fide* indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of Congress."

And in *Mercantile Bank v. New York*, 121 U. S. 138, the court, speaking by Mr. Justice Matthews, after reviewing previous decisions and pointing out (p. 154) the policy and purpose of the act as the key to its proper interpretation, proceeded to declare (p. 157): "The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. *It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.* In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property,"—proceeding then to quote the passage we have cited from *Evansville Bank v. Britton*, *supra*.

In *Amoskeag Savings Bank v. Purdy*, 231 U. S. 373, 390-391, the above-mentioned declaration of the court in *Mercantile Bank v. New York*, 121 U. S. 138, 157, including the citation from *Evansville Bank v. Britton*, was repeated, and it was pointed out that the rule of construction thus laid down had since been consistently adhered to. No decision of this court to which our attention is called has qualified that rule, or construed § 5219 as leaving out of consideration the rate of state taxation imposed upon moneyed capital in the hands of individual citizens invested in loans or securities for the payment of money, either for permanent or temporary purposes, where such moneyed capital comes into competition with that of the national banks. Thus, in *Bank of Commerce v. Seattle*, 166 U. S. 463, 464, the precise ground of decision was the want of a showing that "the moneyed capital left unassessed was, as to any material portion thereof, moneyed capital coming into competition with that of national banks." To the same effect *First National Bank of Wellington v. Chapman*, 173 U. S. 205, 219. In the present case, there is a clear showing of such competition, relatively material in amount, and it follows that, upon the undisputed facts, the ordinance and statute under which the stock of plaintiff in error was assessed, as construed and applied, exceeded the limitation prescribed by § 5219, Rev. Stats., and hence that the tax is invalid.

Application for writ of certiorari denied.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE BRANDEIS dissents.

**MERCHANTS' NATIONAL BANK OF RICHMOND,
VIRGINIA, v. CITY OF RICHMOND.**

**ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE
OF VIRGINIA.**

No. 240. Argued March 21, 1921.—Decided June 6, 1921.

- 1. A judgment of a state supreme court sustaining a state statute and a city ordinance imposing taxes, over the objection that as construed and applied they are repugnant to a law of the United States, is reviewable here by writ of error. P. 637.**